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CONVEYANCER'S NOTEBOOK.

Notwithstanding the "freeze up" and the "ban" on periodicals, which affect us in common with other quarterlies, we are able to welcome the appearance of a new legal periodical. This is *Current Law*, which is to appear monthly as a guide to all current legal topics, whether statute, case law, or that peculiar bugbear of modern times, the statutory rules and orders. This periodical is a very complete index, alphabetically arranged with many cross headings, of what has happened in the previous month and is to be replaced at the end of the year by a Year Book. The cases contain an adequate description of the facts and decision. The statutory rules and orders are listed in such a way that their application can be seen. *Current Law* also contains a note of articles issued in periodicals during the month so that it will be possible to consult such an article should occasion arise.

The total effect of this new periodical is to provide a very adequate apparatus as a supplement to all the usual text-books and ensure a feeling of security from the date of issue, namely, January, 1947, that nothing has been overlooked in respect of more recent law. It has remained one of the great problems of lawyers, increasing with the years and legislative activity, to keep abreast of the new developments. This Digest, published monthly, should solve it in large measure so far as new facts are concerned.

This leads us to reflect upon the functions which legal periodicals can serve. Considerable study of the rules of law and their assimilation for application in practice inclines us to think that writing upon the law involves many gifts and that it is not necessary that all should be looked for in any particular work. In the history of English law some works have stood out and made a lasting name for themselves; need we repeat to conveyancers such works as Co. Litt., Shep. Touch., Fearn, Prest. Abs., and that they have enjoyed their reputation for divers reasons. In *The Conveyancer* we have tried to supply something of each feature, be it current information, practical application in the shape of precedents or analysis of specific problems, or a more complete examination of some branch of the law. This is possible partly because of the very limited scope in the field of English law which we have set ourselves to cover. It is also partly due to the high standard of some of the existing works in this sphere, which makes it

unnecessary to attempt too much. Nevertheless, it is interesting and important to observe that the statutory deluge which is now upon us provides more than scope for all talents.

The ordinary layman is inclined to believe that a lawyer requires to know a number of legal rules and little else. No lawyer would, of course, consciously subscribe to such a view, because he knows that knowledge of a rule is the beginning and not the end. *Current Law* supplies us with the essential beginning without which there can be no satisfactory end. But with this mass of new law there is also the double problem of sorting it out in its relation to existing law and its own relative provisions and also in applying it to the circumstances of life as it has been lived. "Stevenage and all that" is a pretty example of the possible future. What may prove but a pyrrhic victory (if not overruled by the Court of Appeal) nevertheless emphasises the real difficulty of all these new rules, as well as some old ones. The interpretation of the rules of statute and case law involves some logic and often a good deal of prophecy.

Statute law in the past has tended to be neglected in this respect. It is noticeable that publications have tended to be rather reprints of statutes with commentaries annexed to each section rather than connected treatises. It is not insignificant that no new large-scale treatise has been produced on conveyancing since the Property Legislation of 1925, though some old treatises have been brought up to date. We think that this view of statutory legislation rather misses the mark. While it is true that the meaning of any statute is in doubt until pronounced upon by the Courts, the principles of a statute can be extracted in much the same way as the principles of common law can from a series of decisions and be so related as to build up a body of law which should be used to construe the more detailed rules—this is called reading the statute as a whole. With this body of principle it should not be impossible to work out some at least of its practical implications in the general law. In our view too little of this has been done in the past. We need hardly say that in the future we hope to remedy this so far as we may in our appointed sphere. In the meantime we are grateful for all the help we can get from being kept up to date with the rules by *Current Law*.

Planning and the Public.—At the time of going to press we have nothing but a newspaper report of the decision of Henn-Collins, J., in the *Stevenage Case* and a statement that the Minister proposes to appeal. The significance of the case lies in the principles governing what may become an important feature of the land law. The effect of the new planning legislation as a whole, of which the New Towns Act is the forerunner, will be to make decisions concerning the development and use of land much more a question for administrative tribunals. The principles which must guide these tribunals, whether they be constituted by Ministers of the Crown, local authorities, or *ad hoc* bodies, become the concern of all those closely associated with the land law. Whether they like it or not conveyancers are likely to be compelled to take part in what may be described as quasi-litigious proceedings. The amount of authority, though growing rapidly as our notes of cases indicate, so far is small. It is doubtful whether it

can ever be effectively large in the sense of providing very detailed analysis. It must be remembered that the essence of planning is to allow discretionary scope to the administrator. Hard and fast rules fetter such a discretion. The slightest acquaintance with the beginnings and growth of our system of equity shows that between administrative discretion and natural justice and judicial discretion and judge-made law there is a great gulf fixed.

It is not necessary to take sides in the inevitable dispute concerning the merits and demerits of administrative tribunals to foresee that the wide extension of functions of those tribunals will involve reorientation of the outlook of those engaged in the land law. We may draw attention to a note on two cases appearing elsewhere concerning the lack of rules of evidence. Hitherto conveyancers have been accustomed to consider their problems in accordance with fixed and sometimes rigid principles laid down by the Courts. Hereafter many matters will involve the application of considerations much more flexible in kind. We do not think that it will involve less knowledge, it will probably require more, but it will not all be the same. We hope to be able to return to this in more extended form in later issues.

Demi-Nationalisation of Land.—In his speech on the second reading of the Town and Country Planning Bill the Chancellor of the Exchequer, Dr. Dalton, asserted that the Government had no mandate to nationalise land, but that steps were being taken in that direction and not short ones. It is by no means clear that the Chancellor of the Exchequer wished to imply that nationalisation of land was a Labour Party programme in the near future. Indeed, if this were to be the case, the legislation of this Parliament would have the appearance of a "sledge hammer to crack a nut". It is highly complicated but proceeds in large measure on the assumption that private ownership of one kind or another will continue to a large extent. It also assumes, as Dr. Dalton pointed out, that more and more land will find its way into public ownership by way of acquisition by local and other authorities.

From the point of view of those now having interests in land the legislation needs to be looked at as a whole. When the Minister of Town and Country Planning, Mr. Silkin, introduced the Town and Country Planning Bill, he spoke of it as altering the nature of land tenure in this country. This was addressed to a lay House of Commons and must not be taken in any technical sense. It is true that on another occasion the same learned Minister expressed the view that he did not understand the preference for freehold over long leasehold, but with the exception of the New Towns Act of last year this personal opinion does not seem to be reflected in the Government's proposals.

The three legislative proposals essential to a view of the new Land Law are the New Towns Act (*ante*, p. 6), and the Town and Country Planning Bill and the Agriculture Bill, both of which have now been read a second time. Between them these proposals seem to cover the Government control (within limits) of the whole of the land in the country. While the first two concern mainly urban and proposed urban development the latter is devoted essentially to the regulation

of the agricultural areas so long as they remain such. It must not be assumed that the latter Bill cannot apply in an urban area, because, of course, it deals with allotments and small holdings.

It is always dangerous to prophesy, but it is thought that ultimately this legislation will have considerable effects on the practice of conveyancing. It is more than difficult to foresee the precise results, as is the case with all revolutionary changes, and it has never been better illustrated than in the case of the Property Legislation of 1925. In view of the importance of these proposals we have decided to disregard our normal rule of dealing only with legislation that has become effective and make a start while the proposals are still in Bill form.

In fact these proposals are sufficiently sweeping to involve a variety of aspects. In the case of the Town and Country Planning Bill these aspects fall naturally into two parts. First, the machinery of control by planning and the acquisition of land by public authorities for planning purposes represents the impact of the Bill on the public authorities and only indirectly on the private landowner. Secondly, the restriction of user, destruction of development and the creation of compensation rights and development charges are the vital changes in land ownership which this Bill imposes on the private citizen. Though in one sense not severable, these two aspects require such a different approach that separate articles will deal with them. The Agriculture Bill is even further divisible. There are the provisions relating to assured markets which are scarcely within the conveyancer's province. Apart from these there are first the provisions for acquisition and planning control, including the provision of small holdings which is the public ownership side of the problem; secondly, the limitations on ownership by power to control, evict, and compensate private owners which affects all persons having interests in agricultural land; and thirdly, there are the more specific rules governing agricultural tenancies as such with multifarious amendments of the Agricultural Holdings Act. Again, it is hoped to deal separately with these three heads.

The picture presented as a whole is interesting. For the old common law rule *sic utere tuo ut alienum non lēdas* we shall now read that the man in possession may so use his own, for so long as the Minister of Town and Country Planning, the Minister of Agriculture, and such other Ministers and public bodies authorised thereto shall allow and for such purposes as those and any other authorities may permit and upon such terms as to efficient management as they may desire. It is in no wise desired to express an opinion whether this is a good or a bad thing, but it is thought that it cannot be denied that it is a different thing. Incidentally, it may have some interesting repercussions on the law of nuisance.

Again, for the old common law rule that a fee simple existed for so long as the owner did not die intestate and without heirs capable of inheriting (a rule already subject to many modifications) we find now that, at least in agricultural land, a fee simple owner is a tenant at will of the Minister of Agriculture subject to appeal to an Agricultural Land Tribunal—but this, of course, is subject to the general statutory provision on the nature of the circumstances in which the Minister can interfere.

In one sense the owner of agricultural land is more tied than the owner of any other land. He is controlled not only in development and "major" disposition, but he is controlled while occupying it for the purposes of existing user. He cannot even look at his land and let it lie! The rules are positive as well as negative.

It is conceived that all these peculiarities may be reflected in some *de facto*, if not *de jure*, changes in the law of conveyancing. For example, would an estate owner under the Settled Land Act be liable to remaindermen for any conduct which called for interference under the Agriculture Bill? Is an estate owner bound to oppose any compulsory acquisition so far as he may? And so on and so forth! Our law of settlements, whether under the Settled Land Act or by way of trust for sale, was built up on a system of land law completely different from that now about to be imposed. It is thought that precedents and practice may have to undergo careful revision.

In the light of these circumstances we are proposing to deal with general principles in the first few articles. It may subsequently be necessary to examine the effect of these new principles on specific conveyancing problems later.

Completion statement—purchase of long leasehold—ground rent and tax. With reference to the note on p. 185 of Volume 10 (June, 1946), we print below two letters from subscribers:—

"The point raised is a very important one in practice and the figures given would appear to be incorrect. From the information given it is learnt that the ground rent was paid by the vendor to February 2, 1945, and the tax April 5, 1945. The proportion of ground rent is deducted, whereas the proportion of tax is added, which is obviously wrong.

It is suggested that the statement should read:—

	£	s.	d.	£	s.	d.
Purchase money				2,500	0	0
Less proportion of ground rent from February 2, 1945, to December 31, 1945, £1 16s. 6d. net p.a. (332 days)			1 13 2			
Proportion of tax from April 6, 1945, to January 1, 1946, at £1 16s. 6d. p.a. (251 days)*			1 5 1		2 18 3	

The purchaser will on February 2, 1946, pay the £1 16s. 6d. due on that date for ground rent, and for the year April 5, 1945, to April 5, 1946 (actually due on January 1, 1946) he will pay £1 16s. 6d. tax.

Had the vendor paid ground rent to February 2, 1946, and tax to April 5, 1946, the statement would read as follows:—

Balance on completion				2,500	0	0
Add proportion of ground rent from January 1, 1946, to February 2, 1946, at £1 16s. 6d. net p.a. (33 days)					3	4
Add proportion of tax from January 1, 1946, to April 5, 1946, at £1 16s. 6d. p.a. (95 days)					9	6"

*Note.—On our reckoning it is 271 days but arithmetic is not our strong point.

"With reference to the letter printed on p. 185 of *The Conveyancer and Property Lawyer*, Vol. 10 (N.S.) 1945-46, we should be obliged if some guidance could be given on this matter. We have not written earlier as we had expected that this matter would be dealt with further in a subsequent issue.

The practice followed by us and, we believe, the majority of solicitors in this town may be stated briefly as follows:—

Schedule "A" tax is treated in the completion statement in one of two ways, namely:—

A. Where the Schedule A tax is based on the annual value (i.e., personal allowances are not set off against it)

Schedule A tax is apportioned on a day-to-day basis. Ground rent is also apportioned on a day-to-day basis and tax allowed at full standard rate.

B. Where the Schedule A tax is simply the tax on ground rent (i.e., personal allowances have been set off against the assessment)

The Schedule A tax in this case is not apportioned but is paid or allowed by the person who has received the benefit of the tax allowed on payment of the ground rent (*e.g.*, a vendor who has paid the two half-years' instalments of ground rent on May 1 and November 1, pays the Schedule A tax on January 1 in the following year).

Ground rent is then apportioned on a day-to-day basis and allowed to the purchaser without deduction of tax, for the purchaser will be called upon to pay to the Revenue the full allowance in respect of tax which he receives from the freeholder on payment of ground rent."

NOTE.

We confess to some surprise that difficulty is felt to exist. A completion statement is after all merely an adjustment based on the liability of the vendor to meet all actual outgoings to the date of completion assessed on the principle of apportionment from day to day. This is very clearly brought out in the statement supplied by the first of our two subscribers on the assumption that in fact the ground rent is paid to the lessor with deduction of tax at the standard rate. Whether or not the ground rent is so paid will appear from the last receipt for ground rent produced at completion. It is equally clear that the proportion of tax allowable must be shown separately from the ground rent, since it is allowed in respect of periods which are not concurrent. Therefore, the net ground rent payable should be shown in the statement and not the nominal rent, assuming that tax is deducted. In cases of doubt the statement should read: "*Less* proportion of ground rent (£3 13s. 0d. less tax at) from February 2, 1945, to December 31, 1945 (332 days)".

Where the vendor is in possession of the leasehold premises and actually pays the Schedule A tax in full, the apportionment of tax will bear no relation directly to the amount of tax deducted from the ground rent payable. This will only emphasise the necessity for stating these items separately but otherwise it does not affect the question. Where on the other hand the vendor's liability for tax is complicated by

allowances there is a good deal to be said for the method of arranging that the vendor shall discharge his liability for tax to the date of completion with the tax inspector and so avoiding any apportionment of tax. In such a case the proportion of ground rent will still be based on the net rent payable as shown by the last receipt for ground rent.

THE NEW LAND LAW UNDER THE TOWN AND COUNTRY PLANNING BILL.

Apart altogether from the machinery for imposing restrictions upon development generally and for the acquisition compulsorily or by agreement for development purposes, the new Town Planning Bill (hereinafter referred to as the Bill) provides us with three basic new principles of the Land Law. (1) Land will now really mean user of land only and that user will be the user existing at the "appointed day" under the Act or such user as may subsequently be authorised; (2) development right will be changed into betterment compensation (if any); and (3) development charges.

As all students of the Uthwatt Report (*ante*, vol. 7, p. 59) will know, proposals for any satisfactory planning have been regarded as difficult, if not impossible, owing to the expense of "betterment" claims and the so-called unearned increment in value of property due to development by third parties. The Uthwatt Report recommended the extinction of all betterment claims and unearned income by acquisition, once and for all, by the nation of all development rights. Although the Bill does not include all the recommendations of the Committee this fundamental principle has been adopted and seems to be basic to the whole Bill. It is basic in two ways. First, it governs the method of recoupment for all future development, etc., by development charges. Secondly, it leaves untouched values not associated with development. For example, any increase in site value subsequently made by turning an agricultural holding into a garden suburb would, at least theoretically, enure for the benefit of the nation. On the other hand any increase in the value of built-on land by reason of the shortage of houses generally remains to the owner. Politically we can see rocks ahead if too much does accrue to the private owner in this way—and it may be the reason for the hint of nationalisation contained in the speech of the Chancellor of the Exchequer. Legally, however, the existing user is largely uncontrolled (under this Bill: see Notebook, *ante*, p. 143) and is, in fact, the new estate or interest in the land which is created by the Bill.

PERMISSION FOR CHANGE OF USER AND DEVELOPMENT.

Consequently, we must now regard as an incident common to estates that the user of the land by the occupier is determined independently of the grant of the estate or interest enjoyed by the occupier. Under clause 10 (1) permission is required in respect of any "development" after the appointed day. "Development" means (clause 10 (2)) "the carrying out of building, engineering, mining or other operations

in, on, over or under land and the making of any material change in the use of any buildings or other land". The language may seem peculiar. It is not often that one refers to "buildings or *other land*", but this is probably due to the even more curious definition of "land", which by clause 107 (1) means "any corporeal hereditament including a building as defined by this section", that is to say, including "any structure or erection and any part of a building as so defined, but does not include plant or machinery comprised in a building". As they stand, these definitions seem to provide a paradise for lawyers. Building operations are defined to exclude decoration, maintenance or alteration affecting only the interior of buildings. Presumably painting the outside, at any rate if the colour scheme is changed, will be a building operation and require permission. Mining operations are not defined.

Nevertheless, the main purport of clause 10 (2) is clear. It is to render entirely static the user of land in the condition it was at the commencement of the Act subject to permission to develop, the financial benefit of which development is designed to belong to the nation. Hence the ownership of "land", which has never been more than the ownership of an estate or interest in "land", has truly become the ownership of a use of land with possibilities that the use may be changed from time to time, but will on each occasion thereby for the time being become stabilised. To reinforce this revolutionary conclusion we may refer to clause 10 (3), which "for the avoidance of doubt" declares that the use as two or more separate dwelling-houses of a building formerly used as a single dwelling-house involves material change and so does the deposit of refuse or waste materials on land, even if the land was formerly so used, where the superficial area of deposit is thereby extended. Presumably, flat conversion and bonfires will require permission. There are ancillary provisions concerning temporary user and the exclusion of certain forms of user from the meaning of development, such as user of "any building or other land for the purposes of agriculture or forestry", and so, perhaps, roof gardens, including shrubberies, are permissible without seeking permission. Another example is the use of "any buildings or other land within the curtilage of a dwelling-house for *any purpose* incidental to the enjoyment of the dwelling-house *as such*". "Dwelling-house" does not appear to be defined and on the authorities "curtilage" should provide the legal profession with some useful employment, and as both these expressions come from the Town and Country Planning Act, 1932, one would have expected this fact to be well known to the draftsmen of the Bill. No doubt trouble may not have arisen under the 1932 Act, but there it seems that planning was passive rather than active.

We are left wondering whether it will not in future be necessary to draft a recital of estate ownership somewhat in the following words: "The vendor is the estate owner in fee simple of the property herein-after described for user as a dwelling-house [or garage or warehouse or *as the case may be*]" and the habendum to read: "To hold the same unto the Purchaser in fee simple for use as a dwelling-house [or *as the case may be*] or such other use as the planning or any other competent authority may allow". This apparently fantastical suggestion arises, of course, from the position of covenants for title. Under the present law it can be argued that restrictions imposed by town planning are

known or to be known by inspection of the relevant plan and are deemed to be incorporated. Under the new law this will not apparently be so simple. It must be recollected that (a) the description in the contract will presumably be merged in the conveyance, and (b) knowledge of a particular restriction, such as an easement, has not hitherto been regarded as affecting the generality of the covenants unless the conveyance is expressly made subject to it: see *G. W. Ry. v. Fisher*, [1905] 1 Ch. 316. The absence of any express statement on user might be held (i) to exclude the application of the covenant, so that a purchaser thinking he was getting a dwelling-house might in fact get a wood store, or (ii) to imply that the premises would be assumed, *e.g.*, to be a dwelling-house, as is now assumed, *e.g.*, about vacant possession. It seems that in either view one party or the other is from time to time going to suffer injury. Therefore, it is suggested that the fantasy may have some reality.

It is furthermore obvious that in all leases it will be necessary to insert an express covenant against any user not authorised by the planning authority or by-law. Presumably this will be an implied agreement in any tenancy not created by a formal lease and would become one of the "usual covenants". It seems unfortunate that some more definite provisions on this point are not inserted.

There is one other equally wide provision, namely, by clause 23 the planning authority has power to order the discontinuance of existing user and the alteration or removal of existing buildings and works. This can only be done with the consent of the Minister, but there appears to be no restriction on the power, since it is only necessary for such order to be "expedient in the interests of proper planning" (including the interests of amenity). Failure to comply with the order will be an offence punishable by fine as well as render the land subject to enforcement of the order as in any other infringement of the restriction of user. But it has one distinction, namely, that if the value of any interest is depreciated by the order, compensation shall be payable and it is also payable in respect of any injury to any trade, business or profession carried on on the land by the owner of the interest in the land shown to be depreciated. Furthermore, the reasonable cost of any works carried out in pursuance of any such order are recoverable against the local planning authority: clause 24 (2). It also has another distinction. The nature of the compensation right is not determined by the Bill. It is obvious that in fact it is turning a valuable interest in realty into money value, but whether that money value remains realty is left undecided. An obvious example of the problem arises in connection with a specific devise. If A devises Blackacre to B and before his death compensation becomes payable but is not paid, does the compensation right pass to B or does it form part of the residuary estate? It is thought that more will be heard of this kind of question. In the meantime draftsmen of wills should bear this in mind and provide for it, but it is not possible to deal in this place with this issue. We may, however, suggest that it will require attention not only in wills but also in contracts for sale, leases and mortgages (but with regard to mortgages see Schedule IV, para. 5).

Two other provisions, which are analogous, are inserted for maintaining the *status quo* in special cases, namely, the preservation of trees

and woodland and the preservation of buildings of special architectural or historic interest: see clauses 25 and 26. A "tree preservation order" may prohibit cutting down, topping, lopping or wilful destruction of trees, specified in the order, which may refer to trees (or presumably a tree), groups of trees or woodland, and it may secure replanting of any part of a woodland area felled in the course of forestry operations. A "building preservation order", which does not apply to buildings used for ecclesiastical purposes or ancient monuments, may restrict the demolition, alteration or extension of the building. There are compensation clauses which again are left in the air with relation to their nature, but it is provided that expenditure on buildings within a preservation order falls within Part II of Schedule III to the Settled Land Act, that is to say, may be met out of capital and be a capital expenditure or repayable by instalments, but in the clause as it stands it is not clear whether the sums must be repayable by instalments in any event, whether or not a scheme is submitted to the trustees or the Court. The other special provision governing restriction of user relates to the control of advertisements: clause 28. These somewhat complicated provisions are too specialised to call for further comment here.

There is one other matter within this Part of the Bill that may affect certain country areas. If the local planning authority is of opinion that the condition of "any waste or other land" (a) is seriously injuring the amenity of any part of the planning area or of any adjoining area, the authority "may serve on the owner and occupier of the land, in the manner prescribed by regulations under this Act, a notice requiring such steps for abating the injury as may be specified in the notice to be taken within such period as may be so specified". Against such action there appears to be no appeal and there is no definition either of amenity or injury. If the abatement involves expenditure there is no provision for meeting it, though it seems to us most likely to involve lands held on trust either under the Settled Land Act or on trust for sale.

METHOD OF CONTROL.

While it is not intended in this article to pursue details of enforcement we must point out simply the notion of control. There will be a key plan drawn up by the planners which is intended to dictate development. As such this does not affect the individual owner. If he wishes to alter his user in any form he must get permission and the permission will be given or refused in accordance with the key plan. Nevertheless, the Bill does not provide for this in such a form—the application must be made to the local planning authority which has an apparently arbitrary discretion to grant or refuse permission subject to appeal to the Minister, whose decision is final: clauses 12, 13 and 14. There is only one matter of this kind on which the Minister's decision is not final and that is an application for a decision that the proposed user is not restricted by the Bill, *i.e.*, it does not constitute "development": clauses 15 and 16. In this case it shall not be final "for the purposes of any appeal to the Court under the provisions of this Part of this

(a) *Quære*, notwithstanding the definition, is "land" here used in contradistinction to "building or other land"? And how can land be anything but either "waste or other"?

Act relating to the enforcement of planning control": proviso to clause 15 (2). The Court designated for such appeals by clause 21 (4) is petty sessions within which the land is situated with a further appeal to quarter sessions. We cannot help expressing some surprise at the tribunal selected for the onerous duty of construing so complicated and technical an enactment as this. The matter is essentially non-criminal, notwithstanding the creation of a variety of "offences" for infringement of some of the restrictions, *e.g.*, relating to "tree preservation orders" and "building preservation orders". In many matters it may be simply a question of fact, but problems of construction are not unlikely to be fought with tenacity on both sides.

In the event of refusal of permission, where necessary, for "development" there is special provision in cases where "beneficial use" is, or becomes, incapable of being exercised either by reason of deterioration or obsolescence of buildings or through war damage or by reason of the conditions attached to permission and the land cannot be rendered capable of beneficial use by any allowed development: clause 17. In this case the owner may serve a "purchase notice" requiring the land to be purchased by the county council or county borough council in whose district the land is. The Minister must then either confirm the notice or grant permission for the proposed development or some other development in which two latter cases the purchase will not be made.

There are certain types of development "which are not subject to a 'development charge'": see Schedule III. For refusal of permission for any such development (except certain rebuilding) compensation may be payable: clause 18. This may also apply to the case of a direction for other development made in lieu of confirming a "purchase notice".

The duty of ensuring that the restrictions imposed on "development" are observed is laid upon the local planning authority. The procedure is by "enforcement notice". This notice will be served on the owner and occupier of the land specifying the infringement and may require steps to be taken for restoring the land to its condition before the development took place or for complying with any conditions subject to which permission had been given: clause 21 (2). It must also specify a time, not less than twenty-one days after service, in which the notice is to take effect: clause 21 (3). During this period any person aggrieved by the notice can apply to the petty sessional court to which we have already referred. This Court can quash the notice, vary it, or dismiss the appeal, but only on the narrow grounds specified in the Act, which, in effect, amount to quashing or varying where the appellant has had or did not need permission or that the notice exceeds the requirements necessary to restore the land or comply with the conditions: clause 21 (4). Appeal lies to quarter sessions.

If the notice is not complied with non-compliance will constitute a summary offence and the planning authority may enter upon the land and carry out any necessary work to effect compliance: clause 22. The cost of such work by the planning authority will be recoverable from the then owner of the land as a simple contract debt: clause 22 (1). The cost of complying with the notice either by the owner or occupier or planning authority is ultimately to fall on the person by whom the development was carried out: clause 22 (2).

Let us assume that Blackacre is held by X as estate owner in respect of a life interest and he leases the Dower House for twenty-one years to Y. Y builds a greenhouse in the garden during his tenancy in breach of the Act. He assigns his lease to Z and X dies without knowledge of what has taken place. Z goes bankrupt and it is at this stage that the planning authority serve an enforcement notice on Z's trustee in bankruptcy and A and B, statutory owners under the Settled Land Act of Blackacre. Y cannot be found. On whom does the liability fall? Is the sum payable out of capital moneys? It is, of course, not necessary to have such complicated facts to give rise to difficulty, but this does seem to present quite a number of problems all round. We suspect that in the instant case our advice would be for A and B to comply with the notice and apply to the Court under section 64 of the Settled Land Act to authorise payment out of capital money.

As we have indicated, in some cases the Bill creates a new offence. For example, "if any person contravenes the provisions of a 'tree preservation order' he is liable to a fine of £50 on summary conviction and after conviction to 40s. for every additional day on summary conviction". Nothing is said in the Bill about knowledge of the order. Presumably the draftsmen assumed that land so limited would not be sold or the purchaser would have notice, but even then what of successors in title on death? The service of notice on the owners and occupiers of land for the time being should not enure for all time, one would suppose, but the clause (97) which deals with service of notices does not consider this aspect of the question.

There is also the question how, if at all, a purchaser is to know of the existence of an "enforcement notice". Continuing to use the land in contravention of an "enforcement notice" is punishable by a fine of £50 with £20 a day for continued use after conviction.

Probably the answer is to be found in the application of the Land Charges Act to these restrictions. By section 15 (7) of this Act town planning schemes and restrictions on user have to be registered in order to bind a purchaser for value. There is an ambiguous amendment (ambiguous because it refers to para. (a) (ii) which does not appear in the Act) (b), but this does not seem to affect the general tenor of the sub-section. It is probably contemplated that all these "orders" and "notices" are registrable under the Act and will be registered. While a "tree preservation order" seems to fall clearly within the scope of the Act and any successive owner or occupier presumably must search before he makes any move; on the other hand, an "enforcement notice" is not equally clearly within the Act, since it does not impose any prohibition of a restriction on user. *Ex hypothesi* the restriction already existed and the notice really requires something to be done and not to prohibit or restrict something.

Perhaps when the somewhat numerous regulations authorised by the Act are issued we shall get a clearer picture of this very practical aspect of this legislation. At the same time it is necessary to be prepared to carry the duties of search a good deal beyond the usual sphere to protect successors in title and occupiers of land. Even short-term tenants of larger properties may be considerably affected.

(b) *Quære*, para. (b) (ii) is probably meant.

EFFECT OF CONTROL.

In this necessarily summary account of some of the effects of the Bill upon user of the land by owner and occupier, we have drawn attention to the fact that adjustments in conveyancing practice will almost certainly be necessary. Until we can visualise effectively the precise machinery of control it is not easy to prophesy either the exact character or the extent of such changes. Nevertheless, with the threat of "enforcement notices" and summary convictions before us we can hardly wait to learn by experience.

The expressed purpose, *inter alia*, is to discourage land speculation which this and its companion, the Agriculture Bill, should succeed in doing, but this will not alter much normal conveyancing and in particular by way of settlement or will. It is unlikely to affect greatly the granting of leases, nor should it affect mortgages, though they may be regarded as less satisfactory securities than formerly. It is, therefore, necessary to consider exactly what can be settled, sold, leased or mortgaged.

As we have already remarked, the primary effect of the Bill is to turn the legal estate in the land into a "legal user" of the land. No doubt we shall continue to speak of the "fee simple", but this will no longer connote anything equivalent to the absolute ownership of personalty. Actually it will be more equivalent to a perpetual lease without a proviso for re-entry but with a power to enforce the covenants. Once more holding land will involve a real "holding" of the "Crown", though now the Crown in this as in other respects means the Minister of the Crown. After all it was only in 1290 that the Statute *Quia Emptores* was passed!

Although we have likened the interest to a perpetual lease, nevertheless user of the fee simple will be more restricted than is common in leases and in some respects the penalties will be more severe. We cannot be branded as criminals for failure to comply with the covenants in a lease, even after service of a notice under section 146 of the Law of Property Act, 1925. One restriction, not uncommon in leases, does not exist. There is no prohibition on alienation.

On the other hand there is an unusual feature in the capacity of the Crown to alter the single user to which the land can be put so that certainty of tenure does not really exist. For example, if premises are acquired for the purposes of a factory and the Crown directs that they shall be used for no purpose other than a restaurant, the owner has no alternative but to seek different premises. If B buys a house with three storeys to house his large family and is told he may have only two, he must live elsewhere or be in danger under the Public Health Act or some other statutory prohibition for overcrowding.

Now, so far as purchasers, lessees and mortgagees are concerned, this aspect of the new interest in land requires careful attention before the contract, lease, or mortgage is entered into. Probably most of the information can be obtained by inspection of the premises, which will become still more important, and by search in the local land registry, where entries are fortunately made in respect of the land, but we suspect that the nature of adjoining land and premises and the scheme for the district as a whole will now become important.

Covenants by vendors, etc., that they have not done or suffered to be done or permitted or suffered to be permitted on any land thereby conveyed any act, matter or thing which has or might hereafter contravene any scheme, order, etc., under the Town Planning Act may also become common form both in contracts and conveyances. But a purchaser, etc., can only get what the vendor, etc., has to convey. He must take it or leave it and, apart from ascertaining what the position is at the date of contract, etc., he can do little. This scarcely applies to mortgagees, who may require much more. He is not an "owner" for the purposes of the Bill and he will need provision that will enable him to know anything that happens and take any steps necessary to protect his security, *e.g.*, by entering and carrying out an "enforcement notice" or appealing against it, as the case may be. As far as we can see precedents of mortgages will require to be resettled in several respects.

Vendors and lessors will need at least as careful consideration as mortgagees. We have already noted the problem of covenants for title, but who is to take steps in the case of any notice, order, etc., while the vendor is still technically "owner", but his interest is subject to a contract for sale? If he is a lessor he will, apparently, cease to be an "owner" for the purposes of the Bill (except as to Part IV) because he would not be entitled to a rack rent if the land was so let: see clause 107. Hence provisions, both as to giving notice of all notices, orders, etc., and also in respect of compensation unless this matter is covered by regulation, may be necessary. There will also need to be power to enter and determine the lease for any infringement of the Bill and probably other ancillary clauses.

It is, of course, hoped to deal more in detail with these very practical matters and provide precedents at a later stage when the Bill has become law and relevant regulations are available. But it is not too early to face the issue that we must prepare to do this and not rely upon the old rules entirely. What is more, there are other changes. It will be unwise, it is thought, to leave to the operation of the general law the effect of alterations, etc., between contract and conveyance or during the continuance of a lease or mortgage. Compensation may become payable, user may be compulsorily changed, or liability incurred. War-time experience over requisitioned land should point to the need for building up provisions to meet this type of problem. With requisitioned land it was always felt to be temporary—we had hoped, very temporary—but this legislation has come to stay.

It must not be forgotten that permission to "develop" may be as effective as control of "development". So, if a lessee obtains permission to convert a dwelling-house into three flats it presumably cannot then be reconverted to a single dwelling-house. Again, if an inn is used as a dwelling-house (with permission) presumably it ceases to be an inn and cannot subsequently be converted into a hotel or boarding-house—without permission. The variations on this theme where several buildings are involved appear to be immense. Therefore, in leases and mortgages provision must be made for control of applications for permission and for appeals against orders affecting user—unless, of course, the regulations are going to do this for us, which

seems unlikely. Finally, we would insist that we have hinted at the problem rather than tried to provide solutions.

BETTERMENT RIGHTS.

“Development value” is to pass to the nation, though, as we shall see, it does not do so as an interest in land. It is basic to the modern notion that the future development of all land should be in national and not in private interest. The method of vesting this right in the nation is really rather peculiar. It is not done directly but by restriction of the right of user, save with permission, and without compensation save in exceptional cases. In other words it does not really transfer “development value”, but destroys it altogether except upon terms. From this the argument is derived that nothing having been confiscated no case for compensation arises. This is an important argument in the theory of the land law. Some compensation is payable in certain cases, but it is payable for depreciation of land values and not for anything which the nation has acquired. Hence the compensation right when it comes into existence may be regarded as something quite new. It remains to be seen whether it will be so treated or will be treated as if it represented an interest in land acquired by the Crown.

In the main the precise functionings of this part of the Bill can only be ascertained after the publication of the rules authorised by clause 51. In general the compensation fund shall be apportioned out amongst claimants on the depreciation of land values (see clause 54) except when the development value on the appointed day is small: clause 56. The difference between the restricted value, that is, restricted by the Bill without permission being granted, and the unrestricted value on the appointed day is the development value for the purposes of compensation: clause 54. It is declared that the restricted or unrestricted value or both may be a minus quantity: clause 55 (4). By this we understand that the land restricted or otherwise may be a liability instead of an asset.

A Central Land Board is to be set up under the Bill, among whose functions will be the determination of claims in respect of development values: clause 53. These claims may be made in respect of a fee simple or a leasehold interest. A leasehold interest is defined to include an agreement for a lease and an underlease but not an option to take a lease or a mortgage. In order to ascertain the development value the existence of a mortgage is to be disregarded: clause 55 (3). Hence, it appears that both fee simple owners and any lessees must claim separately in respect of their respective interests, but again it is impossible to forecast precisely the procedure or practice until the issue of the regulations to be made respecting such claims.

The payments for such claims are to be met by the issue of Government stock at such date as the Treasury shall determine, being not more than five years after the appointed day for the Act coming into effect so far as restricting the land is concerned, but it will bear interest from the appointed day: clause 58. The rate of interest is to be fixed by the Treasury and shall be subject to redemption, etc., as the Treasury determine: clause 59. There is an exception in respect of war-damaged land which, however, is the subject of several modifications—in this particular instance the payment may be in cash.

It will be observed that this "development value" is turned into something different. So far as it existed at all, which it is difficult to assert in law that it did, it now becomes, if a claim is successful, a right to the issue of Government stock. When the stock is issued, of course it becomes the stock itself. We have "nicknamed" these rights "betterment rights", because it is by no means clear whether they remain the same from the "appointed day" or whether they are converted from time to time.

Let us assume that the "appointed day" is April 1, 1948. On that day A has the legal fee simple in Blackacre subject to a ninety-nine year term (unexpired seventy years) vested in B. At that moment A and B have several rights to "claim" a "payment", *i.e.*, a share of the £300,000,000 potential issue of stock. This claim may or may not be successful. Assuming A and B are awarded a claim, they then have a contingent interest in a share of the stock, but the amount of the interest remains uncertain and, indeed, must remain uncertain, and it is only when ascertained that the share can really be called vested. When the amount of stock has been determined it will then be issued in accordance with Treasury regulations: clause 58 (5). Between the appointed day and this issue no doubt a considerable time—probably years—must elapse. Consequently, quite a number of things may have happened both to A and B and their respective interests in Blackacre so that by April 1, 1952, when the stock is to be issued, various claimants to it may appear.

Let us assume that in 1950 A dies and devises Blackacre to P and his residuary estate to Q. Does Q or does P get the stock in 1952? Again, in 1951 B's lease is determined by forfeiture for non-payment of rent. Does P or Q get the stock or does it still go to B, who may claim that his inability to pay the rent is due to the restrictions placed upon Blackacre by the Bill?

It does not seem to us that this sort of problem has been faced at all. Clause 57 (1) provides that the "right to receive payment" (*i.e.*, the right to receive stock) shall vest in the person who is the owner of the interest on the appointed day. Owner is defined by reference to the War Damage Act, 1943 (c), but this amounts to saying the owner of the legal estate. Consequently, it is clear that A, in our example, has a "betterment right". It is then provided that "the right to receive a payment . . . or a part of such payment shall be transmissible by assignment or by operation of law as a *personal right*" subject to any prescribed notice to the Central Land Board: clause 57 (3). "Personal right" is a peculiar expression in any case. It would seem to suggest that betterment rights, at least until they become Government stock, cease to be property at all. If they are not property it is somewhat difficult to see how they are transmissible at all. But in any event such a right could certainly not be regarded as "realty", or so we should have thought.

On the other hand, where the "betterment right" becomes Government stock it would become personalty. Its transmission on death, etc., would presumably follow the usual rules governing such property and clause 57 (4) would cease to be applicable. To some extent this

(c) One cannot help expressing the view that we might have been spared such a piece of cross reference to an Act designed to be temporary in its operation.

may be affected by clause 58 (5) which enables the Treasury to make regulations *inter alia* for the *evidence* of the person to whom the stock is to be issued—at least we think that is the interpretation of the clause. But if the regulations only affect evidence they cannot, it is submitted, determine the *right* of the person to receive the stock.

It is to be hoped that this aspect of the measure will receive attention before it leaves Parliament. If it does not we can only foresee considerable confusion. It should immediately result in codicils by landowners whose claim may be substantial. But this will only mitigate a small part of the evil. If A, who owns in fee simple, is an estate owner in fee simple under the Settled Land Act, how can it be said that a “personal right” enures for the benefit of the settled land? It is thought that section 58 of the Settled Land Act (as read with section 61 (1)) cannot be prayed in aid to make the right to receive, nor, indeed, the stock when issued, capital money for the purposes of the Act. Nor does section 80 of the Act apply, since it relates only to compensation in respect of breach of covenant, and presumably the law formerly relating to such compensation (*Re Lacon's Settlement*, [1911] 2 Ch. 17) would give the property to the estate owner personally, unless the law has been altered by the trusteeship created by section 16 of the Settled Land Act.

From what we have said we think that it will appear sufficiently that “betterment rights” as created by the Bill will require a good deal of clarification before their nature and effect become settled, and at this stage we can only advise practitioners that this aspect of the Bill will merit their closest attention so soon as it has passed through Parliament. Not only will it be necessary to take the necessary steps to make all appropriate claims, but also it may prove necessary to draft appropriate instruments to deal with problems of transmission.

One further point we would make. Mortgages seem to be left out of the picture. Normally this may be irrelevant, but in some cases, at least, steps should be taken to ensure that the benefit of “betterment rights” is included in the security.

DEVELOPMENT CHARGES.

The *de facto* method of conferring upon the nation the development rights in land is by means of the discretionary power of the Central Land Board to make grant of a licence to “develop” dependent upon the payment of a “development charge”: clause 62. This does not apply to certain forms of “development” set out in Schedule III: clause 62 (2) (a). In effect the exceptions to this liability for development charge are confined to the extension or rebuilding of existing buildings where their extension, etc., is not too great. The Central Land Board may, with the consent of the Treasury, make regulations to cover other exceptions. This is a general power and no doubt will be exercised, but how it is not for us to forecast.

It is to be observed that the development charge is not a charge as is understood in the land law. Here the word “charge” equals “right to a payment” in consideration of the grant of a licence to develop. This payment may be required to be made as a single capital sum or as a series of instalments of capital: clause 64 (1). It would seem that where a single sum is required no question of creating an

incumbrance will arise, because the payment will be made prior to the grant of the licence. Where it is payable by instalments the Board can require covenants and security to be given: clause 64 (2). It is thought that the same principle will be applied for a capital sum paid in one instalment, where for some reason it is not paid immediately; at least, this appears to be implicit in the wording of the clause. But as usual most of the procedure is left to be determined by regulations and until these are issued it is not really possible to examine the precise position. It seems clear that, if the charge is not paid immediately, it has to be "certified" before licence is granted to develop.

One peculiarity is that, where the "determination" that fixes the charge so provides, the charge and licence will cease if, before the operations to which they relate are completed, any interest in the land is transferred or created: clause 65 (1). So, for example, if it was intended to develop by building leases it *might* be necessary for the individual builder to get a determination if the lease was granted prior to completion of the house. Whether this could be avoided by agreements for leases remains to be seen, but probably an agreement for a lease would be an "interest" in the land.

We have been unable to find any provision making development charges registrable as local land charges. This is probably due to the fact that the Central Land Board can require any security it likes and, consequently, the ordinary law presumably applies to such security. At the same time it may be incumbent on purchasers to see that a proper licence has been obtained for development, because the Central Land Board have power to assess a development charge in respect of development which has not been assessed as required by the Bill: clause 67. It is not clear whether in such circumstances the order of the Board could specify a purchaser. This is particularly important as they may also assess a penalty for contravention recoverable up to £500 in the county court.

It will be observed that these provisions for development charges represent the smallest change in the land law. The Bill does not as such vest any interest in the land in the Crown in respect of development rights. When development does occur, if it occurs, there *may* be an incumbrance on the land, but this will presumably take a comparatively normal form and one which, if it continues, will do so for a limited time only. In the fullness of time the developed land will become an uncharged capital asset analogous to the present position except, of course, that restrictions on further development remain.

CONCLUSION.

It must be pointed out that this is a very summary account of main principles in the Bill relating to the substantive land law. Much will depend on the nature of the regulations issued. Many matters of detail have been omitted as irrelevant to our present purpose. In particular we have scarcely adverted to powers of modification and revocation and specific matters, such as advertisements, which are referred to particularly in the Bill.

We have tried to emphasise more especially those particulars which are likely to affect the conveyancing art so soon as the provisions of the Bill become operative. It must be remembered that primarily the

Bill is restrictive so far as private owners are concerned. To this extent it should operate, for example, to render less necessary the comprehensive restrictive covenants now usual in large scale development and may even have some effect in more isolated transactions. On the other hand the uncertainty of obtaining licences to develop may make conveyances of parts of land held in single ownership more concerned with the continuance of "amenities" over land retained by the vendor. Inspection of land about to be purchased and clauses to retain enjoyment of facilities on any land retained may become more important. No doubt this last aspect of the matter will be more in point in country properties and must be taken in conjunction with the provisions of the Agriculture Bill. To the country landowner, who is, after all, the person *mainly* concerned with the large scale operation of this legislation, it is the joint effect of these Bills that will have to be considered. We hope to be able to return to these matters in later issues.

HAROLD POTTER.

THE MENDING OF RENTS IN THE SETTLED LAND CURTAIN.

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"Make do and mend" is the order of the day and there is no reason why invisible mending should not be made applicable to the "Rents in the Settled Land Curtain" so visibly exposed in the searching article under that title by Professor Potter in the March issue of *The Conveyancer and Property Lawyer* (Vol. 10, pp. 135-154). Referring to *Re Bridgett and Hayes' Contract*, [1928] Ch. 163 (now perhaps one of the most frequently cited cases in "Settled Land Conveyancing"), the writer of that article observes (p. 138): "It is to be noted that the learned Judge did not hold, indeed the then practice of the Probate Registry would not have enabled him to hold, that where there is no exception of settled land contained in the general grant, settled land that does not cease to be settled land passes to the general personal representative notwithstanding section 22 of the Administration of Estates Act, 1925. It is submitted that if an estate owner must be deemed to have appointed the trustees of the settlement as his special personal representatives, then the legal estate must vest in them and not the general personal representatives notwithstanding the absence of any exception of settled land", and in a footnote to that passage on the same page Professor Potter observes: "This is perhaps one of the most difficult of the problems dealt with in this article. For another interpretation of the position and the reason for S. L. A., s. 110 (3), see 79 *Solicitors' Journal* 243, where a different conclusion is reached. The effect of a grant not necessarily including any particular property seems to be obscure". The present writer dealt with some aspects of the matter in the issue of the *Law Journal*, September 15, 1945 (95 *Law Journal*, pp. 299-300), as one of a series of his articles on "Some Practical Problems in Conveyancing", under the title "Settled Land

and General Grants". I return to the topic in particular relation to the former article. That eminently "practical man", Mr. A. H. Cosway, in one of his several manuals upon the mechanics of Conveyancing, aptly remarked ("The Devolution of Settled Land", p. 37): "It is rather a peculiar characteristic of the recent [that is, the 1925] legislation that the breaking up or subdivision of the comprehensive 1922 [Law of Property] Act has been so accomplished that we have continually to jump from one Act to another". In addition we have the Probate Rules and Practice Directions of the Probate Registry, which, it is submitted, while affecting the Probate Practice, cannot override the interpretation of the statutes in relation to the general Law of Property and the Practice of Conveyancing. Whether the right kind of grant has been made from the point of view of Probate Practice is one thing, what the effect is of a grant when once made is another. *Whitehead v. Taylor*, 10 A. & E. 210, which Professor Potter cites, may be regarded as authority for illustrating two propositions, namely, that "the law knows no interval between the testator's death and the vesting of the right in his representative", and that "as soon as the executor obtains probate his right is considered as accruing from the testator's death" (Robbins and Maw, *Devolution of Real Estate and Administration of Assets*, 3rd ed., pp. 24, 26, citing also *Ingle v. Richards*, 28 Beav. 366). "A grant of probate until revoked is conclusive evidence of the title of the person to whom the grant is made to be executor" (*ibid.*, p. 26, citing *Concha v. Concha*, 11 App. Cas. 541, 552, 562).

Let us assume that it is wrong to suppose that the legal estate in what one may compendiously refer to as continuing settled land on the death of the tenant for life vests in his own "general" personal representatives and that it is right to assume, as Professor Potter submits, that it vested in the "trustees of the settlement" who are the persons deemed to have been appointed "special personal representatives". The grant of probate to the general personal representatives none the less remains conclusive until revoked. While according to the traditional view the grant of probate is, in fact, an imprimatur merely of the authority conferred upon the executor by the will (*ibid.*, p. 24, citing *Smith v. Riches*, 1 T. R. 475, 480; *Wankford v. Wankford*, 1 Salk. 299, and *Re Barber, Burgess v. Vinnicome*, 34 Ch. D. 77, 83), and the tenant for life if he had not appointed special personal representatives will be deemed to have appointed the trustees of the settlement to be such, a purchaser who takes a conveyance from a personal representative is protected by statute. Section 37 of the A. E. A., 1925, is perfectly explicit—the actual wording should be closely scrutinised rather than a summarised statement of its effect (see sub-section (1) *infra*). As observed in Wolstenholme and Cherry, *Conveyancing Statutes*, 12th ed., "this section is new and confirms *Hewson v. Shelley*, [1914] 2 Ch. 12". Attention is therein called to section 27 (2), "protecting persons who convey to or deal with *de facto* representatives". Section 37 is thus a statutory enunciation of the principle laid down in *Hewson v. Shelley*, *supra*. The latter case in effect established this proposition:—

Suppose X to have been intestate, and consequentially administration was granted to Y. Y conveys to a purchaser Z. Subsequently

it is discovered that X was testate and in fact had appointed A as executor, whereupon the grant to Y is revoked. The revocation does not invalidate Z's title to the property. What may be regarded as the rationale of the principle? Surely it is that the certification by the Probate Court of Y's authority is not invalidated by the authority of A conferred by the will which does not become operative from a conveyancing standpoint to nullify previous dealings by the former grantee of the Court. A grant from the Probate Court has the authority of an order of the Court, and conveyances made by virtue thereof are conclusive in favour of a purchaser (see L. P. A., 1925, s. 204 (1)).

The dynamics of the legal estate on the death of an estate owner are worthy of analysis from an historical standpoint. Challis observed (*Real Property*, 3rd ed., p. 101): "By the provision of several statutes the immediate freehold may perhaps, under certain circumstances, be placed in abeyance". At this point, Charles Sweet, the learned editor of that edition, added in a footnote, "As to the effect of section 1 of the Land Transfer Act, 1897, see *John v. John*, [1898] 2 Ch. 573; *In bonis Pryse*, [1904] P. 301". A note in the 2nd ed. of Robbins and Maw, *Devolution of Real Estate and Administration of Assets*, reproduced in the 3rd ed. at p. 77 (1901) contains an early anticipation of some of the problems of the methodology of the S. L. A. and A. E. A., 1925. The note states: "The estate or interest taken by the executors or administrators of a deceased owner of real estate must apparently be in its quality one of two things: it must be regarded either as an artificial prolongation of the deceased person's life until the determination of the period of administration, or as a new estate or interest, involuntary by way of assignment, during that period, of the estate or interest of the devisee or heir, or heir of the body of the deceased owner, but paramount to such last-mentioned estate or interest". According to the first alternative, the learned text-writers observe, "if the deceased person had only an estate for life, under a settlement or will, such estate must be deemed to continue after the date of his actual death until the estate has been fully administered or until a surrender of the estate and interest" to the next beneficiary entitled was made by the personal representatives. The note finally adopts the view of the second alternative, which in effect involved the view ultimately upheld as the law, that under the L. T. A., 1897, interests in real estate defeasible upon death were excluded from the provisions thereof.

The relevance of the quotation for the present purpose lies in the fact that the quest for the whereabouts of the legal estate, always a matter of first importance, has become generally paramount since the new Property Legislation 1925. The quest involves both whence and whither.

As Pearson, J., observed in *Re Pilling's Trust*, 26 Ch. D. 432, with reference to the legal estate, "Where is it?" There is now no abeyance of a legal estate in land by reason of absence of or irregularity of the appointment of a special personal representative such as is referred to in the citation from Challis, *Real Property* (*supra*), the *dicta* in *Johns v. Johns* (*supra*) and *Re Griggs*, [1914] 2 Ch. 347, being overruled (as observed in *Wolstenholme and Cherry* (*supra*) in the note to A. E. A., 1925, s. 9) in respect of deaths after 1925. A legal estate

now must be somewhere and the analysis of the position can thus be limited to the question (in respect of the statics of the legal estate when the beneficial interest is a tenancy for life on the death of the beneficiary) as to what may be the interpretation of the effect of the appropriate statutory provisions of the 1925 legislation. Section 22 (1) of the A. E. A., 1925, provides that: "A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land". It may be contended that the effect of section 1 (1) of the Act and section 55 (1) (xi) thereof (the former dealing with devolution generally and the latter the definition of personal representatives), and of section 7 (1) of the S. L. A., 1925 (dealing generally with procedure on the death of a tenant for life), and section 117 (1) (xviii) is to vest the legal estate in land on the death of the tenant for life in the special personal representatives, expressly or impliedly appointed as such. Assuming that that view of the statics of the legal estate is accepted, then, in the submission of the present writer, that in no way affects the dynamics thereof once probate or letters of administration are granted in respect of the estate of the deceased tenant for life, for those to whom such grant was made have complete disposing power by statutory authority (for the case of an intestacy of tenant for life see section 162 of the Judicature Act, 1925, as amended by the Administration of Justice Act, 1928, s. 9).

If the contrary is contended, then certain sections of the 1925 legislation must be inevitably regarded as completely nugatory. In the submission of the present writer it is in the effect of the grants, and not in the statics of the legal estate in respect of a deceased tenant for life, that the source of the dynamics of disposition of his estate are to be found. This, perhaps, can best be seen by the fact that on the intestacy of a tenant for life in a subsisting settlement, where there are trustees of the settlement, administration will only be granted to the trustees if willing to act (Judicature Act, 1925, s. 162 (1), proviso (a), as amended by the Administration of Justice Act, 1928, s. 9). It cannot be other than the fact that in the interim until the grant is made the legal estate is vested in the Probate Judge (A. E. A., 1925, s. 9).

First, as regards further movement of the estate the question of a purchaser must be considered. The words of section 37 (1) of the A. E. A., 1925, are so explicit that nothing but, it would seem, a repeal could negative them. The section provides that: "All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration". The note thereon in Wolstenholme and Cherry (*supra*) states that this is confirmation of *Hewson v. Shelley* (*supra*) and calls attention to section 27 (2), "protecting persons who convey to or deal with *de facto* representatives". Furthermore, L. P. A., 1925, s. 204 (1), makes orders of Court conclusive and probate and letters of administration

are orders of Court, as above noted. Section 110 (3) of the S. L. A., 1925, is often cited in support of the same proposition. This is the sub-section which protects purchasers in dealing with personal representatives. It may be urged against invocation of this section that by reason of the definition of the personal representatives in relation to the Act (section 117 (1) (xviii)), the provision has sole relation to special personal representatives. In the view of the present writer, even if it availed, the sub-section is not necessary to establish the proposition of the validity of dispositions to a purchaser by a grant of probate or letters of administration having regard to the express enactments in that behalf previously cited.

Next as regards further movement of the legal estate to assentees. Section 36 (4) of the A. E. A., 1925, provides that "An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates . . .". Nothing could be clearer, nothing more conclusive.

Section 36 (2) describes its investitive functions. "The assent shall operate to vest in that person [*i.e.*, the assentee] the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased". The note thereon in Wolstenholme and Cherry (*supra*) elucidates the process:—

"This sub-section makes the assent into the act in law by which the estate or interest is vested in the person named. Before 1926 the operation of an assent (which then could only be made by an executor) was to make the dispositions of the will operative. The vesting in the beneficiary took effect not by the mere force of the assent of the executor, but by virtue of the disposition in the will, which became operative because of the assent: *Attenborough v. Solomon*, [1913] A. C. 76, 82. Under this sub-section the assent becomes a new form of conveyance; it is excepted from the requirements of the L. P. A., 1925, s. 52 (conveyances to be by deed) by sub-section (2) of that section."

The fact that the equitable rights of a genuine beneficiary are preserved against a wrong assentee does not alter the whereabouts of the legal estate consequential upon the assent until due adjustment has taken place (see A. E. A., 1925, s. 36 (2) and (9) and s. 38).

It is worthy of note that the definition of personal representative in section 55 (1) (xi) of the A. E. A., 1925, for the purpose thereof states that "personal representative" means the executor or administrator, and "executor" includes a person deemed to be appointed executor as respects settled land—it differs from the definition section of the S. L. A., 1925, where in section 117 (1) (xviii) "personal representative where there are special personal representatives means those personal representatives"—note the distinction, not "*includes*" (as in the A. E. A., 1925), but "*means*". The A. E. A., 1925, is comprehensively inclusive—the S. L. A., 1925, is, merely relatively, definitive. The difference in the wording of the fundamental "dictionary" clauses of the two Acts cannot be fortuitous, and, it is submitted, point to the essential character of the A. E. A., 1925, as the determining statute in relation to succession.

Upon the above analysis of the sections of the relevant statutes the submissions of the present writer are based that a grant of probate or letters of administration confers upon the grantee the power of conclusively vesting in the purchaser or assentee in accordance with the provisions of the A. E. A., 1925, the legal estate held by the testator or intestate, to whose estate probate or letters of administration have been granted. The statutory conferment is not so much investitive, as potentially transvestitive or divestitive. A note in Wolstenholme and Cherry (*supra*) to section 36 (7) of the A. E. A., 1925, observes that the purchaser "must see that the legal estate devolved on the representatives (he will, for this purpose, inspect the probate or administration, not the will) and inspect the endorsements". This clearly shows that the probate or letters of administration form the definite "charter" of the personal representatives, and *Re Duce and Boot's Cash Chemists*, [1937] Ch. 642, has not essentially altered the position, since if a purchaser either goes behind the curtain or the curtain is drawn for him, that is a process particular, and irregularly particular, to the transaction, for the probate or letters of administration and nothing else constitute the testimony to the personal representatives' credentials.

That the time has come for a statutory reconciliation of the succession provisions of the 1925 legislation seems evident. It may be considered desirable to go back to the 1922 plan and recreate a consolidating statute with Parts instead of separate Acts. Till then the Acts must be taken as they stand, and the general principles of statutory interpretation invoked to "make do and mend" any rents which the wearing process has revealed.

It is quite possible that the solution of the difficulty and the reconciliation of the views of Professor Potter and the *Law Times'* contributor referred to in the former's article "Dispositions of Settled Land by Personal Representatives" (*ante*, p. 91), and those of the present writer as above submitted is to be found in regarding the matter from the standpoint of powers of disposition rather than of the whereabouts of the legal estate (see the last paragraph on p. 92 in Professor Potter's article and the last paragraph on p. 94 of the reply of the *Law Times'* contributor). In this respect the subject is an exception to the underlying principle of the Property Legislation of 1925 in that it places powers above estates. It was observed in the 22nd ed. of *Prideaux's Precedents in Conveyancing* (the first ed. dealing with the 1925 legislation) that "the basis of conveyancing is shifted from powers to estates. There are, however, exceptions to this rule" (pp. 7, 8) (*a*). In the submission of the present writer the case of a grantee of the Probate Court, as above referred to, is one of these exceptions. It would seem as if a general grant confers a statutory power of disposition similar to the statutory power of a tenant for life under the pre-1925 Settled Land Acts without the tenant for life necessarily having a legal estate. It is sufficient for the purpose of the present writer if the power is recognised as embodying conveyancing capacity, whatever views may be held as to the whereabouts of the legal estate

(a) To the same effect, Sir Benjamin Cherry's Lectures on "The New Property Acts", at p. 20.

prior to the general grantee's exercise of disposition. The validating force of the A. E. A., 1925, s. 37 (1) would seem to be supreme.

THE NATURE AND EFFECT OF LICENCES.

By E. O. WALFORD, LL.D., Solicitor.

According to the decision in *Wood v. Leadbitter*, 13 M. & W. at p. 864, a licence coupled with a grant by deed (or by parol if the interest can be granted by parol) is irrevocable; but a parol licence (*i.e.*, a licence granted under hand or orally), though coupled with a parol grant, is revocable if the grant can only be made by deed. It will be submitted that at the present day each of those propositions is misleading; but in order to clear the ground for the discussion of the various technical points which arise it seems necessary to consider first what is meant by a licence "coupled with a grant" and by the term "irrevocable".

LICENCE COUPLED WITH A GRANT.

There are several old decisions which bring out the point that a licence to pass over, or do some other act on, the grantor's land is merely a personal grant or concession by the then owner conferring no recognised interest in land and ceasing when that owner sells or demises the land. It was indeed said, in effect, that the grantee of a gratuitous licence exercised it at his peril, being liable at any moment to become a trespasser, for it was quite unnecessary that the owner should advise the licensee of the transfer of the land: *Wallis v. Harrison*, 4 M. & W. 538; *Plummer v. Webb*, Noys 98. It may be that this is still an approximation of the law where the licence is gratuitous and is for no definite period; but it is certainly not possible to state the law in such wide terms at the present day, as will be seen from the authorities cited in this article, and see particularly *Minister of Health v. Bellotti*, [1944] 1 All E. R. 238. The early decisions are mentioned only for the purpose of emphasising the essential distinction between a licence and the grant of an interest in land properly so called.

What, then, is the meaning of a "licence coupled with a grant"? It is certainly not clear that this phrase means a licence coupled with a grant of a recognised interest in land. In *Jones v. Tankerville*, [1909] 2 Ch. at p. 442, it was said that "if A sells to B felled timber lying on A's lands on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers" (and cf. *Wood v. Manley*, 11 Ad. & El. 34). Here it will be noted that the reference is to the legal property in the timber. There is no suggestion that the licence is irrevocable because it is coupled with the grant of an interest in land. Indeed, in the same judgment it was said that a licence was "irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser; and the interest so conferred may be either a *purely chattel interest* or an interest in realty". It is important to bear in mind this

fact; for it should not be regarded as a denial of the statement in *Wood v. Leadbitter*, 13 M. & W. at p. 844, that a licence not amounting to or comprising a grant of a known interest in land is *normally* revocable whether the licence is under hand or under seal. It does not seem that in *Jones v. Tankerville*, *supra*, the licence to remove the felled timber could have been regarded as a legal interest in land; nor does it seem that the sale of timber as such ready for felling, and intended to be felled by the purchaser, is treated in law as a sale of an interest in land: see *Marshall v. Green*, 1 Q. B. D. 700, and *Smith v. Surman*, 9 B. & C. 561 (a).

IRREVOCABILITY.

It is not proposed to consider here the cases concerning a licence granted by A to B to do something on the land of B in such a manner as to affect A's enjoyment of A's land. It may, however, be worth mentioning the case of *Winter v. Brockwell*, 8 East 308, where licence was given by A to B to enclose an aperture (on B's premises) through which A was entitled to receive light. Subsequently A endeavoured to compel B to re-open the aperture, but was non-suited on the ground that a licence executory is revocable but a licence executed is not: *Web v. Paternoster* (Palmer's Rep. at p. 71). However, that proposition, in so wide a form, must be confined to things done by a man on his own land, and it is not proposed to pause here to consider whether the proposition, thus limited, rests upon estoppel or some other doctrine. The points which it is desired to make at this stage in connection with the proposition that certain licences are irrevocable are as follows:—

(1) A document which is termed a licence may amount in law to a lease or an easement or to some other legal interest in land, or an enforceable contract to grant such a lease, easement or other legal interest. It is clear that such so-called licences are irrevocable, and may be effective against the successors of the grantor subject (where necessary) to any appropriate land charge or other registration.

(2) A licence may not operate by way of grant or contract to grant such an interest. It may, however, have been granted for value. Clearly, damages would be recoverable by the grantee from the grantor in respect of the wrongful revocation of the licence, and in accordance with *Wood v. Leadbitter*, *supra*, and other decisions, damages were at one time considered to be the only remedy. The doctrine was that as the licence created no recognised legal interest in the land, no right *in rem* but merely a right *in personam*, if we may employ those rather

(a) The cases decided in connection with s. 4 of the Statute of Frauds certainly turn upon the question whether the contract related to an interest in or concerning land, and there are cases which suggest that some contracts for the sale of natural growing crops or fruit which are ultimately to be severed by the purchaser confer an interest in land; but it is not thought that this line of cases (*e.g.*, *Rodwell v. Phillips* (1842), 9 M. & W. 502) has any direct bearing on the point under consideration. One of such cases serves, however, as a reminder that a sale of growing grass to be mown by the purchaser, being "coupled with an interest in the land", may be unenforceable for that very reason if it is not evidenced by writing as required by s. 4 of the Statute of Frauds (now the L. P. A. 1925, s. 40). It is, however, extremely difficult to reconcile all the decisions concerning the applicability of that section. It will be seen from a perusal of *Marshall v. Green*, *supra*, that a sale of timber which is to be left to grow (*i.e.*, is not sold for immediate felling), may fall within the section, the deduction being that in such circumstances the sale is not of timber as such (*i.e.*, as a mere chattel).

overworked terms, there was no room for any remedy except damages : *Kerrison v. Smith*, [1897] 2 Q. B. 445. To that extent it might be said that the licence was irrevocable, for the grantor could not revoke it with impunity. However, it is hardly logical to say on the one hand that the licence is irrevocable and on the other that damages can be awarded if it is revoked, for the award of damages for revocation is based on the assumption that the revocation was effective. It would be pleasant indeed if it were possible to devise a satisfactory means of defining the circumstances in which licences conferring mere contractual rights and granted for valuable or other good consideration can be revoked during their currency. Unfortunately, that is not possible. It can be said only that if a licence creates contractual rights which are such that the Court would think fit to protect them by a decree of specific performance or by granting an injunction (b), then such a licence cannot be effectively revoked. It is certainly not possible to say that the sole test is whether damages are a sufficient remedy, as may be seen from the decision in *Thompson v. Park*, [1944] 2 All E. R. 477, C. A., where Goddard, L.J., intimated that it is not possible specifically to enforce a contract to share the same premises (as distinct from a contract to take a lease of a specified portion of those premises). Nor would it seem that there is any justification for the adoption, as the test of specific enforceability, of the question whether the interest conferred by the licence is a legal interest in land or a contract to grant such an interest, or whether any successor in title of the grantor would be bound by the terms of the licence. If damages would not be a sufficient remedy and the case is not within the recognised classes of case in which specific performance is refused, it would hardly seem that the Court would refuse that relief merely because the burden of the licence would not rest upon a successor of the grantor. Indeed, the usual position is that contracts are enforceable only against the parties to them (c).

It has been said very aptly by Lord Greene in *Millenium v. Winter Garden Theatre*, [1946] 1 All E. R. 678, that the question whether a licence is revocable immediately or after notice, or at all, is to be determined by "the terms of the contract when properly construed in the light of any relevant and admissible circumstances". In that case a licence to use a theatre was granted to Millenium Products, Ltd., for a certain period with further options. The final option was that of "further continuing the licence" *without any limit of time*, with the right for the licensees (but not the licensors) to determine the licence by giving one month's notice.

It is by no means clear that the so-called licence was not in fact a lease, as the retention by the licensors of the bar, cloakrooms and programme rights would not necessarily reduce the status of Millenium Productions, Ltd., to that of licensees; but the case was dealt with as

(b) It would appear that if the case is one in which the Court would grant an injunction to restrain the defendant from committing a breach of the contract then there would also be irrevocability in the true sense. For, in granting such an injunction the Court is merely enforcing specific performance in another fashion: cf. *Metropolitan Electric Supply Co., Ltd. v. Ginder*, [1901] 2 Ch. 799.

(c) The question of land charge registration will be dealt with at a later stage; but it may be remarked that unless a licence creates an interest which is, in fact, registrable as a land charge, such registration will have no effect.

one of licence (d). The licensees exercised both the earlier and the final options. The licensors purported to determine the licence. It was contended by counsel for the licensors that there was a rule of law that a licence was determinable by a licensor notwithstanding the absence of any express provision to that in the licence. In the course of his judgment Lord Greene referred to the decision in *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K. B. 1, which appears to lay down the rule that a ticket for a theatre seat confers an irrevocable licence upon the ticket-holder, as "a decision which has not satisfied everybody". He did not throw any doubt upon the actual decision in that case, but treated the instant case as one in which the breach of the "licence contract" or any steps pursuant to its wrongful revocation could be restrained by a Court of equity. As Lord Greene said, in the old days the wrongful determination of the licence would have given rise only to a claim in damages. "The licence would have stood revoked, but after what was the appropriate period of grace the licensees would have been trespassers". Having regard to its bearing on the much debated case of *Hurst v. Picture Theatres, Ltd.*, *supra*, and to the fact that it contains the gist of the *ratio decidendi* in the *Millenium Case*, I venture to set out below *verbatim* the following passage from Lord Greene's judgment in the last-mentioned case:—

"But the matter requires to be considered further because the power of equity to grant an injunction to restrain a breach of contract is, of course, a power exercisable in any Court. The general rule is that, before equity will grant such an injunction, there must be, on the construction of the contract, a negative clause express or implied. In the present case it seems to me that the grant of an option which if I am right is an irrevocable option, *must imply a negative undertaking by the licensor not to revoke it*. That being so, in my opinion, such a contract could be enforced in equity by an injunction. Then the question would arise, at what time can equity interfere? If the licensor were threatening to revoke, equity, I apprehend, would grant an injunction to restrain him from carrying out his threat".

Proceeding, his Lordship indicated that if the licensor had purported to revoke the licence but nothing had been done to alter the *status quo*, an injunction could be granted to restrain the licensors from acting upon the purported revocation.

Thus, the question whether *Hurst v. Picture Theatres, Ltd.* is supportable on principle did not arise. One is left admiring the skill of the Court of Appeal in avoiding—presumably with gladness, in accordance with precedent—the task of criticising its own decision. If, however, a contractual right by way of option implies a negative obligation not to revoke it, it does not seem unreasonable to ask why all licences conferring a valid right to enjoy certain privileges for a specified period of time do not imply a negative obligation not to revoke them. Or do they? And is the only difficulty in connection with the grant of an injunction to protect and preserve the rights of a theatre ticket-holder a practical one, namely, that equity cannot intervene in

(d) That being so, the question of the invalidity of a lease purporting to endure for an indefinite period could not arise. There is no rule against perpetuities in relation to the duration of contractual rights under a licence where those rights do not amount to recognised interests in land.

time to grant an effective injunction. If so, presumably an injunction could, and should, be granted where a series of tickets entitles the holder to see a series of entertainments continuing for, say, a week or a fortnight, as in the case where the plaintiff holds a book of tickets extending over a fortnight and entitling him to view lawn tennis at Wimbledon. Possibly, subject to any conditions on the tickets, that may be a type of case in which an injunction would be granted; but it is certainly not possible to adopt the duration of the licence as the sole test of the question whether an injunction will be granted to restrain the revocation of a licence or the putting into effect of such revocation. It is necessary only to refer to *Thompson v. Park*, *supra*, in order to appreciate the fact that rights granted by licence for a definite term are not necessarily of such a nature that the Court will protect them by the grant of an injunction or enforce them by a decree of specific performance. It may perhaps be said that not only does equity do nothing in vain—it also refuses to do anything which it considers to be foolish or undesirable. One would be tempted to applaud the view of the Court of Appeal in *Thompson v. Park* (as mentioned above) that it is impracticable to require persons to share a house when they are unwilling to do so, if one were not mindful of the quite recent threat by the Government to compel those with spare rooms to do that very thing. However, that goes to show only that it is very difficult to know what licences will in fact be considered by the Courts to be worthy of protection by injunction or specific performance.

Because of its bearing on the subsequent portions of this article, it is emphasised that though it may be impossible for the grantor to revoke certain types of licence *vis-à-vis* the grantee, as is demonstrated by the *Millenium Case*, *supra*, and the licence is to that extent irrevocable in such case, no mere licence is irrevocable in the sense that the burden of it runs, or can be made to run with the land over which the grantee is entitled to exercise the privileges granted by the licence. By a “mere licence” I mean a licence which does not create an obligation to grant, and does not itself grant a recognised interest in land. However, although the burden of a licence does not so run, it is obvious that the *benefit* of a licence if not by its very nature or terms personal to the grantee, may, as in the case of other contracts, be assignable. Hence the licence may be irrevocable *vis-à-vis* an assignee of the benefit of the licence. The fact that the benefit of a mere licence cannot be enforced against the successor in title of the grantor of the licence is established by decisions which will be mentioned later in this article.

SPECIFIC PERFORMANCE OF LICENCES?

Most licences merely authorise the grantee to do something on the grantor's land and do not, in general, require the grantor to perform obligations, though there are no doubt cases in which a licence does contain such a requirement. That might be the case where the licensee has a right to use a machine on the grantor's land and the licence imposes upon the grantor the obligation to keep the machine in repair. *Shayler v. Woolf*, [1946] 1 All E. R. 464 and on appeal [1946] 2 All E. R. 54, was a case in which A had agreed to supply an adjoining owner B with water by means of a certain pump on A's land, and B was given the right to enter on A's land to lay mains and for other

purposes in connection with the enjoyment of the right to receive the water supply from the pump. Default was made by A. B claimed (i) specific performance, (ii) a mandatory injunction to compel the defendant to supply water as agreed, and (iii) damages were claimed by B; but the claim in respect of specific performance and a mandatory injunction were both abandoned, and in the result damages only were demanded. It may be that it was recognised that difficulties were perceived in pressing for specific performance of such an obligation, or it may be that damages were in fact a sufficient remedy. Whatever may be the explanation of the outcome of that particular action I have not found any case in which a decree of specific performance of a mere licence has been obtained.

It would be rash to say that no case could arise in which a decree of specific performance of a mere licence could be obtained, but in general there will be nothing to be "performed" by the grantor of the licence, and the licensee will, therefore, be adequately protected by an injunction. It will have been noted that Lord Greene in the *Millenium Case* considered that the grant of an irrevocable option "must imply a negative undertaking not to revoke it", and that "such a contract [*i.e.*, option] could be enforced in equity by an injunction". However, it will also have been observed from the earlier portion of this article that Goddard, L.J., in *Thompson v. Park*, made it clear that in his view it was not to be expected that every type of licence or contract conferring privileges in connection with land would be specifically enforced, instancing an agreement to share possession as a case in which specific performance would not be decreed. As the remedy which was being sought in that case was an injunction, and the remarks of the learned Lord Justice were made in the course of the statement of his reasons for the refusal of the Court of Appeal to grant an injunction, it may be reasonable to conclude that no distinction between the enforcement of performance by the grant of an injunction and its enforcement by a decree of specific performance was intended.

To avoid misunderstanding I mention that in this section of the article I am dealing with cases of mere licence. There is no reason why specific performance should not be granted as a matter of right in cases where the licence in fact amounts to a contract to grant a legal interest in land. The question "What legal interests in land can subsist?" is dealt with in a later part of this article.

This would appear to be a convenient stage at which to consider another aspect of the problem.

EQUITABLE EASEMENTS?

The possibility that an injunction may be granted in some cases in support of the rights of a licensee, coupled with the fact that the grant of an injunction is a method of enforcing specific performance of the licensor's obligations or of some of those obligations, may create the impression that a licence may confer upon the grantee some sort of equitable interest in land, and the further impression that such an equitable interest might be capable of protection by the registration of a land charge under the Land Charges Act, 1925. The question of land charge registration must be deferred until a later stage; but it is proposed to consider in this section whether a licence

not amounting to a grant of a legal estate or a contract to create such an estate may operate by way of a species of equitable easement.

SALMOND'S VIEWS.

In his work on *Torts* (6th edition), at p. 305, Salmond refers to a grant, even under seal, permitting advertisements to be put on the grantor's property, and says that such a grant amounts at the most to a mere licence or equitable servitude. It seems doubtful whether the use of the term "equitable servitude" is judicious in such a connection. He gives as examples of equitable servitudes, the right to an uninterrupted view or the right of privacy; but except as to an "uninterrupted view" given by virtue of a restrictive covenant, which has been said to operate as a species of equitable easement, neither of the examples would appear to be servitudes either in equity or at law.

In the case of *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D., at p. 781, Lindley, L.J., said that he was "not prepared to say that any covenant which imposes a burden upon land does run with the [burdened] land unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rentcharge or some estate or interest in the land". On the other hand, Salmond (*ubi supra*, p. 299) appears to have considered that all rights of entry for any purpose relating to the dominant land are recognised legal easements, a view which seems doubtful. If it were correct, a right to enter upon land to remove buildings or trees in order that an adjoining property should enjoy an uninterrupted view would be a legal easement—a proposition which cannot be supported by any judicial decision, though a restrictive covenant may produce the same result.

Referring to the case of *Moreland v. Richardson* (1855), 25 L. J. Ch. 883, Salmond (*ibid.*, p. 305) states that a right of burial granted by the owners of a cemetery "was enforced by injunction against a subsequent mortgagee who had taken as mortgagee with notice of the right in question". Salmond acknowledges that such a right could not amount to a legal easement even though granted by deed, because it was a right in gross. "Yet", says Salmond, "it was held to constitute a good equitable servitude which ran with the land" (e). If that statement were correct it would certainly be difficult to explain how it could so run; for it is plain from such cases as *Ackroyd v. Smith* (1850), 10 C. B. 164, and the more modern cases already mentioned in this article, that a right in gross cannot be an easement, legal or equitable. However, upon reference to the report it appears that Salmond had either overlooked or forgotten the details of the judgment. The learned Master of the Rolls mentioned that the right of burial did not amount to the purchase of the soil of the graves, and expressly stated that the defendants were not mortgagees, but held the assignment of the mortgage in trust for the trustees of the chapel. "They are", he said, "the trustees of the chapel if not actually, at least in substance and effect" and he treated them as such and not as mortgagees. As trustees of the chapel they could, of course, be in no better position than their predecessors who had

(e) It is quite clear from the context that Salmond meant that the *burden* ran with the *servient* land.

granted the right of burial, provided that the grantee could show that the grant of the right of burial created a trust in his favour as distinct from a mere contractual right, a point which cannot be pursued here. The fact remains that it was not held, as Salmond thought, that the right of burial constituted "a good equitable servitude which ran with the [servient] land". The conception of a servitude without a dominant tenement is unknown to English law (f).

Salmond also refers to the case of *Hervey v. Smith* (1856), 22 Beav. 299, where the material right was a right for one of the owners of two adjoining properties to discharge smoke from his building into the chimney of the other adjoining property. The right was granted under hand only, and Salmond observes that it was "a good equitable servitude", and appears to have considered that it was a case running parallel with *Moreland v. Richardson*, *supra*. That would not appear to be so, for in *Hervey v. Smith* the premises emitting the smoke constituted the dominant tenement, but in *Moreland's Case* there was no dominant tenement.

CLASSES OF EASEMENTS.

The question which does arise out of such decisions as *Hervey v. Smith* is whether the class of easements, other than those created by statute, is closed, or whether Lord Herschell was right when he observed in *Simpson v. Godmanchester*, [1896] 1 Ch. 214, at p. 218, that "It is a fallacy to suppose that every easement must be brought within some particular class which has been recognised, such as the class relating to watercourses, or light or air, or otherwise". It is not too easy to reconcile the accepted rule that novel incidents may not be attached to land and made to run with it at law either by way of burden or of benefit with the view that new "classes" of easements may be created. Nevertheless modern decisions may be cited which indicate that the Herschell doctrine has taken root. Thus, it may be pointed out that since the decision in *Hervey v. Smith*, *supra*, a right to discharge smoke into the chimney of neighbouring premises was held in *Cable v. Bryant*, [1908] 1 Ch. 259, to constitute a valid easement. The doctrine that new easements must be admitted in order to keep pace with the progress of science was not originated by Lord Herschell. It was enunciated by Lord St. Leonards in *Dyce v. Hay* (1852), 1 Macq. 305, and was approved in 1915 by the Privy Council: see *Att.-Gen. of Southern Nigeria v. Holt*, [1915] A. C. 599.

There is no doubt that modern decisions reveal a tendency to concentrate upon the question whether the right conferred upon the grantee is intended to be enjoyed exclusively for the benefit of some other specific land, rather than to consider whether the right is one which has been held to fall within a recognised class of easement: see the last-mentioned decision.

HILL v. TUPPER.

Salmond (*Torts*, 3rd ed., at page 307) refers to *Hill v. Tupper* (1863), 2 H. & C. 121, "in which the plaintiff had acquired

(f) Whilst it may seem peculiar to compare a right of burial with a right to place pipes on land, it happens that the case of *Newcastle Corporation v. Wolstanton, Ltd.*, [1946] 2 All E. R. 447, is apposite in relation to the point here mentioned.

by grant under the seal of a canal company an exclusive right of keeping pleasure-boats for hire upon the canal. He sued at law for damages a stranger who infringed this monopoly, and it was held that he had no such cause of action". The Court considered that the grant merely operated as a licence or covenant on the part of the grantors, and (though binding on them as between themselves and the grantee) that it gave him no right of action against third parties for infringement of the supposed monopoly. The right was clearly a right in gross and not for the benefit of any dominant tenement. In *Nuttall v. Bracewell* (1866), L. R. 2 Ex. 1, Bramwell, B., said that if anyone had interfered with the grantee's right to row on the canal the grantee might have maintained an action against him; but "he sued, not because his rowing was interfered with, but because the defendant used a boat on the water". Salmond (*Torts*, 3rd ed., p. 307) comments upon *Hill v. Tupper*, *supra*, as follows: "This absence of a legal remedy by way of damages available by a licensee against a stranger is a very anomalous feature of our law. It seems curious that he who, by agreement with the occupier of a building, has expended money in painting advertisements upon one of its walls should have no legal remedy against a third person who wilfully defaces them. The whole law on this matter requires more consideration than it has received." Probably there are many who will agree with Salmond's observations on this point.

LAND CHARGE REGISTRATION.

Still pursuing the question whether a licence enforceable by injunction, but not creating a legal estate or operating as a contract to create such an estate, may amount to an equitable interest enforceable against a successor in title of the grantor, we turn to the question whether registration under the Land Charges Act, 1925, of a land charge in respect of the licence, or rather the rights conferred by it, may work any magic in that connection. As the provisions of the Land Charges Act, 1925, cannot be understood without reference to the provisions of the Law of Property Act concerning interests in land which are capable of subsisting whether at law or as equitable interests, it will be necessary to refer to that Act. But first let us see what possibilities there are that a class of land charge may be found which will protect a mere licensee (whether the licence is granted for value or not). We can, for the present, ignore contracts to grant easements in fee simple or for a term of years because such contracts are contracts to grant legal estates, and there is no doubt that such contracts are registrable as estate contracts. It may, however, be convenient to point out here that where a licence which is in fact under hand purports to create a legal easement but fails to achieve that object because it is not under seal, and for that reason only, then it will be desirable to register a land charge (estate contract) on the assumption that it will take effect in equity as a contract to grant a legal easement. Returning to our mere licence, what classes of land might conceivably be registered in respect of such licence? We may make the assumption that the licence is of such a kind that an injunction would be granted in order to restrain a breach by the grantor; but we shall not find that this point is material.

Of the "mortgages, charges or obligations affecting land" which may be registered under section 10 of the Land Charges Act, 1925, the only items which could possibly be material are equitable charges not secured by a deposit of documents relating to the legal estate affected, in the Act called "general equitable charges" (Class C (iii)), and "equitable easements" (Class D (iii)).

I do not think that there is any sufficient ground for suggesting that a mere licence can operate as an equitable charge. The essence of a charge is that it should create some sort of security by way of pledge, lien or otherwise for the performance of an obligation. It does not seem to be arguable that the interest which a mere licensee has in the land over which he is to exercise privileges under a licence is an "equitable charge" upon that land, though it might be an equitable interest. This brings us to "equitable easements". The Land Charges Act, 1925, s. 10, provides that charges or obligations of (*inter alia*) the following class may be registered as land charges (Class D (iii)):

"Any easement right or privilege over or affecting land created or arising after the commencement of this Act, and being merely an equitable interest (in this Act referred to as an 'equitable easement')".

Can a valid land charge of that class be registered in respect of a mere licence? In order to discuss that question it is necessary to ascertain whether a mere licence can take effect as an "equitable interest", the term "equitable easement" in the above provision being merely a convenient expression.

The controlling words are "being merely an equitable interest". It is also necessary to discover the meaning of "easement right or privilege over or affecting land". The investigation of these matters must therefore proceed by stages.

Land.

"An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute" is capable of subsisting at law and is a legal estate: L. P. A., 1925, s. 1 (2). It is also "land", *ibid.*, s. 205 (1) (ix) (g). The definition in section 205 (1) (ix) includes (*inter alia*) "an easement, right, privilege, or benefit (*h*) in, over, or derived from land". Several reasons may be given for the view that the rights referred to in section 1 (2) must be deemed to be such as are known to the law.

First, it will be recalled that section 62 (1) of the Law of Property Act, 1925, enacts that a conveyance of land shall be deemed to include (*inter alia*) all "liberties, privileges, easements, rights, and advantages whatsoever" appertaining to the land or enjoyed with it. Those words are very wide, but it has been held that they pass only interests in land known to the law: *Bartlett v. Tottenham*, [1932] Ch. 114; cf. *Burrows v. Lang*, [1901] 2 Ch. 502; *White v. Williams*, 91 L. J. K. B. 721.

(g) This does not mean that the grantee of such rights obtains an exclusive grant of the soil: concurrent legal estates can exist—the fee simple in the land, the fee simple in a right of way thereover, and so forth.

(h) It will have been observed that the words "or benefit" do not occur in s. 1 (2), which refers only to "easements, rights, or privileges", but the exact intention or effect of inserting the additional words "or benefit" is not clear.

Secondly, the phrase "rights or privileges" is not new. For the purpose of the Local Government Act, 1858, s. 50, and the Public Health Act, 1875, s. 166, the words "rights, powers or privileges" were held to include franchises (which can subsist at law as recognised incorporeal hereditaments) and not to include mere contractual rights: *Spurling v. Bantoft*, [1891] 2 Q. B. 384; cf. *Fearon v. Mitchell*, L. R. 7 Q. B. 690.

If these examples are not conclusive it may be pointed out that sections 6 (1) and 62 (1) of the Conveyancing Act, 1881, both referred to "rights" and "privileges". Thus, section 62 (1) refers to a conveyance of land to the use that a person may have an easement, right or privilege in the grantee and "the persons deriving title under him". Commenting upon that provision the learned editors of Wolstenholme's Conveyancing and Settled Land Acts (ninth edition) observed as follows:—

"Here 'deriving title' means by and according to law; consequently this section does not confer any new power of transmitting title, or enable the creation of any new kind of easement, or make assignable that which was not by law assignable": p. 127.

It may be mentioned that Sir Benjamin Cherry, who was so closely concerned with the Property Statutes of 1925, was one of the editors responsible for the above statement.

Again, section 6 (1) of the Conveyancing Act, 1881, enacts that a conveyance of land shall operate to convey (*inter alia*)—

"All liberties, *privileges*, easements, *rights* and advantages . . . appertaining or reputed to appertain to the land."

The same words are repeated in sub-section (1) of section 62 of the Law of Property Act, 1925 (*i*). Commenting upon that sub-section the editor of Hood and Challis's *Property Acts* observes that "the general words imported by this section will only pass such rights as are known to the law: *Burrows v. Lang*, [1901] 2 Ch. 502; *Bartlett v. Tottenham*, [1932] Ch. 114; and such as the grantor could convey by express words: *Godwin v. Schweppes, Ltd.*, [1902] 1 Ch. 926; *Quicke v. Chapman*, [1903] 1 Ch. 659". In other words, as the rights referred to are notionally added to the parcels, which will be conveyed to the grantee in fee simple or for a term of years, the rights in question must be rights which *can* be held in fee simple or for a term of years. Of course, contractual rights may endure for a term of years but they cannot appropriately be demised for a term of years or conveyed in fee simple. On these grounds it is submitted that the "rights or privileges" over or affecting land which are referred to in the Land Charges Act, 1925, are rights and privileges known to the law and capable of being granted for a legal estate.

Equitable Interests.

It will have been noted that an easement, right or privilege registrable as a Class D (iii) land charge must be one which is "merely an equitable interest". It will not be disputed that an easement for an estate equivalent to an estate in fee simple or for a

(i) In *Le Strange v. Pettefar* (1939), 161 L. T. 300, that sub-section was referred to: but the *dicta* throw little light on the point now under consideration.

term of years absolute, if granted in the appropriate manner, does not require registration as a land charge. It is, therefore, reasonable to conclude that the easements, rights and privileges, "being merely equitable interests" which are intended to be registered as Class D (iii) land charges, are easements, rights or privileges which are not granted for a legal estate, *i.e.*, which are not to be held in fee simple or for a term of years absolute. That view is expressed by the editor of Hood and Challis's *Property Acts* (8th edition), at p. 800.

It may be asked whether the term "equitable interest" does not apply to a case where a grant not amounting to a legal easement owing to want of formality is effective in equity as an "equitable easement", upon the ground that it operates as a contract to grant a legal easement. The answer appears to be in the negative, for the following reason. If the licence did operate as a contract "to convey or create a legal estate" it would be registrable as an "estate contract" (Class C (iv)). Hence, it could not be intended that any licence operating as a contract to grant a legal easement should be registrable as an "equitable interest" within Class D (iii).

Equitable interests in land may, of course, exist. The Law of Property Act, 1925, s. 1 (8), defines "equitable interests" as

"Estates, interests, and charges in or over land which are not legal estates".

Section 4 (1) of the same Act provides that

"Interests in land . . . which are not capable of subsisting as legal estates shall take effect as equitable interests"—

which seems to be very much the same thing in different words. The sub-section then proceeds to state what interests can be created as equitable interests, thus—

"Save as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as *legal interests*, shall be capable of being created as equitable interests": *ibid.*

But the suggestion may still be pursued that possibly the new legislation permits of the creation of new kinds of equitable interests. That suggestion is, however, disposed of by a proviso to the last-mentioned sub-section which declares that after the commencement of the Act (and save as thereafter expressly enacted) an equitable interest in land shall only be capable of being validly created in any case in which an *equivalent equitable interest* in property real or personal (*k*) could have been validly created before such commencement. For these reasons it is submitted that the "rights" and "privileges" referred to in the Land Charges Act and capable of registration as "equitable interests" by way of equitable easements are—like those referred to in section 1 of the Law of Property Act, 1925—recognised interests in land, that is, interests capable of being created as legal interests before 1926 and also capable of existing for an equivalent equitable interest before that date.

Nothing in the Property Acts suggests that the registrability of "rights" or "privileges" under the Land Charges Act is in any way

(k) See, for example, ss. 130 and 132 of the L. P. A. 1925.

connected with the question whether such rights or privileges are enforceable by a decree of specific performance or by injunction (l).

So much for the notion that the mere possibility of specific enforcement (by injunction or otherwise) may import a species of equitable interest in land capable of being protected by land charge registration, though not constituting a recognised interest in land or a contract to create such an interest.

CUSTOMARY RIGHTS AND PROFITS À PRENDRE.

It is, of course, possible for certain legal rights in the nature of privileges to exist without a dominant tenement, but they are closely limited. Public rights of way and other customary local rights enjoyed by the public generally or by a limited class exercising a certain calling, *e.g.*, the right of fishermen of a seaside town or village to lay out their nets to dry on certain land. Further, profits à prendre can exist as legal rights in land if granted by deed, and such profits may also exist as equitable rights if informally created. On the same principle that a contract to grant an easement can be specifically enforced, a contract to grant a profit à prendre may also be similarly enforced, and a legal grant decreed: *Frogley v. Lovelace* (1859), John. 333.

HURST v. ASSOCIATED PICTURE THEATRES, LTD.

It has been felt necessary to survey a rather wide field before dealing with the specific question whether *Hurst v. Associated Picture Theatres, Ltd.* was wrongly decided and, incidentally, whether it overruled *Wood v. Leadbitter*, *supra*. It would appear to me that there should be little surprise that a decision in 1915 by a Court entitled to consider equitable doctrines should differ from the enunciation of the common law by the Court of Exchequer in the early part of the nineteenth century. In any event, in *Wood v. Leadbitter* the plaintiff was not seeking an equitable remedy, and no suggestion appears to have been made by counsel that the principles of equity could be applied. Since the Judicature Act the effect of the fusion of law and equity is that a modern Court has before it a plaintiff who is entitled to say: "By reason of the contract which I made with the plaintiffs they were obliged to permit me to remain in the seat which I had bought. If they had threatened to remove me from it I could have obtained an injunction to restrain them from so doing. It is therefore idle for the defendants to allege that upon the wrongful determination of my licence I became in law a trespasser. To permit such a plea would be to sanction the very act which I was entitled to restrain by injunction. If it be said that I had no legal interest in land, but only a personal contract, I may point out that there is no reason why a personal contract should not be the subject of specific performance or an injunction to restrain its breach". The plaintiff might instance the case in which an injunction was granted restraining the buyer of a vessel from committing a breach of the terms of a charterparty of

(l) I should be interested if any reader can point to a case in which a decree of specific performance of a licence (as distinct from an injunction restraining a breach) has been granted where the rights conferred by the licence did not amount to a contract to create a recognised interest in land.

which the buyer had notice: *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1926] A. C. 108, a decision to which it will be necessary to refer again in a later part of this article.

It is, indeed, only when there has been a disposition of the property to which a licence relates that its limitations appear. It is then that such decisions as *King v. Allen & Sons Billposting, Ltd.*, [1916] A. C. 54, and *Clapman v. Edwards*, [1938] 2 All E. R. 507, reveal the chink in the armour of the licensee. No such point arose in *Hurst v. Associated Picture Theatres, Ltd.*

OBLIGATION TO PERMIT WORK.

It is generally considered to be settled law that an obligation to do something on land cannot be made to run with that land. It is not so clear whether the obligation to permit the execution on the land of the work might run with the land where it has been acquired with notice of the obligation to do the work. If the obligation to erect a building is personal to the covenantor, a power for the covenantee in case of default to enter himself and erect it would seem on principle to be exercisable against the original covenantor only. There are, however, certain remarks of Fry, J., in *Andrew v. Aitken* (1882), 22 Ch. D. 218, which throw doubt upon this view. A grant of freehold land at a rentcharge contained a covenant to erect a house or houses of certain value upon the land. In the course of his judgment Fry, J., referred to the argument that an assignee of the land could not be compelled to put his hand in his pocket to build the house, and proceeded as follows: "It may well be that although the plaintiff could not be called upon to build the house he might be called upon to allow the house to be built, and the difficult question might arise with regard to the extent to which that liability existed. He might be harassed in an action relying on *Spencer's Case* [5 Rep. 16a]; he might be harassed with an action relying on *Cooke v. Chilcott* [3 Ch. D. 694], which although more or less infringed upon by the recent decision in the Court of Appeal [presumably *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562], was not expressly overruled by them. He might be harassed with an action founded upon the fact that he had agreed to take subject to the covenant, and it might be that taking subject to the covenant he might be liable to allow the house to be built if the covenantor in the original contract preferred to build rather than to pay the damages to Sir J. Anson [the original covenantee]. These appear to me to be questions of some nicety".

It has been rightly said of *Andrew v. Aitken*, *supra*, that the suggestion that an assignee of land might be obliged to permit an affirmative covenant to be performed by the original covenantor is novel. Nevertheless the point appears to be an open one unless it is effectively answered by saying that the acceptance of the decision would involve the proposition that positive covenants do bind the land in the hands of an assignee of the covenantor, except that the assignee cannot be compelled to perform the covenant himself or to pay the expenses of so doing. It would not appear that such an answer is in any way satisfactory.

Another rather peculiar case which bears upon this question is *Sharpe v. Durrant*, 55 S. J. 423, in which Warrington, J., held that where A

had entered into a covenant to make certain tramway crossings, B, the assignee of the burdened land, was bound to permit the crossings to be made. Shortly the points which arose were as follows:—

- (1) By a conveyance from A to B the right was reserved to A to make tramway crossings at two points to be selected by A. The time within which the selection was to be made was not specified. It was held that this provision amounted to a purported easement *in futuro* and was void as infringing the rule against perpetuities.
- (2) A personal agreement not creating an interest in land is not within the rule against perpetuities: see *per* Farwell, L.J., in *S. E. Ry. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. Accordingly a covenant to make and provide tramway crossings being a personal covenant creating no interest in land is not affected by the perpetuity rule. Warrington, J., considered that as the obligation to provide crossings involved an obligation not to interfere with passage over the crossings, the successor of the plaintiff having notice of the obligation was bound not to do that which his predecessor could not do. In other words, the obligation to provide crossings, though positive in form, was in effect negative, for, as Warrington, J., put it, “to provide a crossing and be at liberty to obstruct it would be an absurd contradiction”.

The decision last mentioned was not reported in the Official Law Reports. Possibly it may have been thought that it was difficult to justify the view that a personal covenant imposing positive obligations, and neither *creating a recognised interest in land, nor providing for the creation of such an interest*, could operate as an easement. I say “operate as an easement” for the following reasons.

Even if the covenant to provide a crossing implied a covenant not to do anything to obstruct the use of a portion of the land, the effect would not be to reduce the covenantor’s obligation to a restrictive covenant, for a restrictive covenant does not carry with it the obligation *to permit something to be done on the covenantor’s land*. It merely prevents the covenantor from doing something on his land. If A grants to B the right to do something on A’s land, then B has either a licence or an easement; and it is fallacious to say that a covenant by A to provide facilities for the doing of something on his land is, in effect, a negative covenant because it involves the obligation to refrain from doing anything which would prevent the enjoyment of those facilities. The fallacy of this proposition is clearly exposed by the decision in *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E. R. 483, which is dealt with at some length below. If the covenant is, in fact, to provide facilities which are capable of subsisting as an easement then the question whether an easement is created will depend upon the nature of the right granted, the form of the document and the question whether a dominant tenement exists, and is capable of being benefited by that right, and whether the grantee has some interest in the dominant tenement—and for this purpose even a yearly tenancy would appear to constitute a sufficient interest: see *Rymer v. McIlroy*, [1897] 1 Ch. 528.

The position may perhaps be summed up as follows :—

- (1) If A grants to B the right to do something on A's land, then if the right is not granted for the benefit of a dominant tenement in which B has a sufficient interest, the right conferred upon B can be no more than a licence. It matters not whether the grant is under hand only or under seal.
- (2) If the right conferred amounts only to a licence any power which it purports to confer upon B to do something on the land will be void if that power is exercisable beyond the period permitted by the rule against perpetuities, unless the case falls within one of the authorised exceptions, such as the rights (in connection with mining, felling and carrying away trees, executing repairs, alterations or additions to buildings, drainage, and other similar works) mentioned in section 162 of the Law of Property Act, 1925. It was indeed considered that even a right of entry in the event of non-payment of a rentcharge might be subject to the perpetuity rule, until the doubt was resolved by the section last mentioned.
- (3) If A covenants with B that A will do something on his own land, the burden of that positive obligation cannot run with the land in such a manner as to require a purchaser from A to perform that positive obligation. Nor, it is submitted, can a purchaser from A be compelled to submit to any use of his land, or the doing of any other acts thereon, unless in addition to the positive obligation to do something on A's land A's covenant also extends to the grant of rights thereover which can amount in law to an easement, right or privilege capable of subsisting for a legal estate. It is suggested that the decisions already dealt with in the earlier part of this article are sufficient authority for the propositions in this paragraph; but if that view is not accepted the modern decisions of *Frank Warr & Co., Ltd. v. L.C.C.*, [1904] 1 K. B. 713, and *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E. R. 483, may be cited in support of that view. In the latter case A had purported to "demise" to B "the free and exclusive use of all the refreshment rooms, bars, and of some other parts of a certain theatre for the purpose only of the supply to and the accommodation of the visitors to the theatre", with certain exclusive rights of advertising and of selling programmes and other articles. The dealings with the theatre were somewhat complex, but the "lease" last mentioned remained subsisting. C ultimately became the owner of the theatre and refused to allow the assignee of the "lease" to exercise the rights conferred by it upon B. It seems clear that C had acquired the theatre with notice of the so-called lease: see the concluding remarks of Lord Wright, at p. 491

of the report (*m*). Nevertheless it was held that the "lease" being in fact a mere licence, did not bind C.

I have mentioned this question of notice because it is indicated in Cheshire's excellent work on Modern Real Property (5th edition, at p. 241) that "a licence coupled with an interest creates a right over the land that can be assigned to a third party, though, unlike an easement, it will not bind persons who *without notice* of its existence acquire the land from the licensor". That passage would certainly appear to suggest that such a licence *would* be binding on a person who acquired the land on which the licence was to be exercised if he acquired it with notice of the licence. Now, in *Clore v. Theatrical Properties, Ltd.*, *supra*, the so-called lease was held to be merely a licence. Nevertheless it was a licence coupled with an interest, for the grantee was given the right to use parts of the theatre for a long period of years in order to enjoy the privilege of selling drinks, programmes and other articles. Moreover the assign clearly had notice of the grant of the so-called lease; yet it was held not to be effective against him.

Another reason for considering this point at some length is that it would seem from the above-mentioned passages in Salmond's work on *Torts* that Salmond, whose views are always worthy of the most serious consideration, appears to have considered that there might exist a species of equitable servitude which was not capable of subsisting as a legal easement. For the reasons stated at length in the earlier part of this article it is submitted that such a proposition is untenable, though it is possible, as appears from *Moreland v. Richardson*, *supra*, that a right granted by A to B, and amounting only to a personal right, may be enforceable against C if A was a trustee granting the right and C is merely a new trustee taking the place of A; cf. *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108; and *Les Affréteurs Réunis v. Walford*, [1919] A. C. 801 (which did not, however, relate to interests in land). In principle it would seem that it would be insufficient to establish merely that A was a trustee, for if B could not establish that A was a trustee *for him* then C as A's successor could be no trustee for B. Thus, if the relationship between A and B was merely contractual the mere fact that A was a trustee would not render A's successor liable to B.

HURST v. ASSOCIATED PICTURE THEATRES AGAIN.

What, then, is to be said of *Hurst v. Associated Picture Theatres, Ltd.*, *supra*? Did the Court of Appeal, as Holdsworth has suggested, disregard the rule that the irrevocability of a licence coupled with a grant depends upon whether the grant is "of some ascertainable property capable of being granted", by which Holdsworth presumably meant "some recognised interest in land capable of being granted"?

(*m*) No suggestion was made by counsel that the rights conferred by the "lease" were equitable interests in the nature of "rights" or "privileges" over or affecting land, and thus falling within s. 10 (1) of the Land Charges Act, 1925. If the rights had amounted to equitable interests in land, registration of a land charge of Class D (iii) would have been necessary in order that a subsequent purchaser should be bound by those interests if the so-called lease had been granted after December 31, 1925; but it was in fact granted in 1919. No doubt the reason for the omission of any reference to the Land Charges Act, 1925, was that B's assignee was contending that B held a valid lease.

As was said in *Jones & Son v. Earl of Tankerville*, [1909] 2 Ch. at p. 442, "a licence is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser; and the interest so conferred may be a purely chattel interest or an interest in realty". The example is given in that case of the sale of felled timber, and the licence to carry it away is there said to be irrevocable "because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers": and cf. *Wood v. Manley*, 11 Ad. & El. 34. It can hardly be suggested that felled timber constitutes land: see the Sale of Goods Act, 1893, s. 62 (1); *Marshall v. Green* (1875), 1 C. P. D. 35; *Re Ainslie* (1885), 30 Ch. D. 485.

The next point to be noted is that even where a licence is coupled with an interest in land there is nothing in *Hurst v. Picture Theatres, Ltd.*, which suggests that a purchaser who acquires the land upon which the licence is to be exercised is bound by the licence. A number of decisions to the contrary have already been noted in this article; and it is, therefore, unnecessary to refer to them again here.

What, then, is the effect of *Hurst v. Picture Theatres, Ltd.* It is submitted that the position was correctly stated by Salmond as follows:—

"A licence granted for a fixed period [for value] is in all ordinary cases specifically enforceable—an injunction being obtainable to prevent its premature revocation (*n*). A licensee, therefore, cannot be now treated as a trespasser because of doing an act which the licensor may be compelled by injunction to allow him to do", Salmond on *Torts* (6th ed.), at p. 309.

In other words, as against the grantor of the licence, but not against a purchaser of the grantor's land, a licence granted for value may be enforced by an injunction (unless it is one which the Courts do not think fit to enforce, *e.g.*, owing to illegality, or to difficulty in enforcing compliance with the agreed terms). If, as Salmond contends, the licensee in such cases cannot be treated as a trespasser if the licence is revoked prematurely, there would seem to be no difficulty in holding, as the majority of the Court of Appeal did hold in *Hurst v. Picture Theatres, Ltd.*, that a person who has purchased a theatre ticket has a cause of action in tort in respect of his forcible removal during the performance by the order of the manager of the theatre proprietors who had sold the ticket to him.

If it is contended that the adoption of such a view is impossible because the revocation even though wrongful terminates the licence, there being no grant of any interest either in the land or in any chattel thereon, two replies may be made. First, that the purchaser of the ticket might well be said to have an interest in the seat to which his ticket related. Secondly, there is no necessity, as between parties to an agreement, that the party seeking an injunction to restrain the breach of the agreement should have an interest in land. As is indicated in Seton's *Judgments and Orders* (7th ed.), at p. 527, the tendency of modern decisions is to negative the idea that the jurisdiction to grant injunctions depends on a negative stipulation, and

(*n*) It is not to be forgotten that there may be cases in which the Court will consider that the contract is not one where an injunction can or should be granted: see *Thompson v. Park*, [1944] 2 All E. R. 477. referred to in the earlier portion of this article.

to rest the question upon the nature and substance of the contract, and whether the case is a proper subject for an injunction or for damages. The cases cited in support of that view are *Donnell v. Bennett*, 22 Ch. D. 835, and *Keith Prowse & Co. v. National Telephone Co.*, [1894] 2 Ch. 147, where an injunction was granted restraining interference by the defendants with telephone wires which were on the defendants' land under an agreement with the plaintiffs. Similarly, specific performance has been compelled indirectly by injunctions restraining railway companies from not stopping at a certain station, as in *Hood v. N. E. Ry.*, L. R. 5 Ch. 525; *Rigby v. G. W. Ry.*, 10 Jur. 488, 531; *Phillips v. G. W. Ry.*, L. R. 7 Ch. 409; and *Wilson v. Northampton and Banbury Ry.*, L. R. 9 Ch. 279.

The final submissions which are made are as follows:—

- (1) If a right which is granted by a landowner for value in respect of anything to be done on his land is one which will be protected by the grant of an injunction *against him* in the event of his interference with the exercise of that right, such right is irrevocable during the period for which it is granted provided that no change of interest in A's land takes place meanwhile.
- (2) Wrongful revocation of such a right during the agreed period does not make the grantee of the right a trespasser, *i.e.*, it does not alter his right to be on the land. Accordingly, if he is wrongfully removed by or by order of the grantor of the licence whilst lawfully exercising his right he is entitled to damages for assault, and also for breach of contract (if he can prove damage).
- (3) No right or privilege which is granted by a landowner in connection with the use or occupation of land or of a building or part of a building thereon, will be binding on any purchaser from the landowner (whether he owns the freehold or a leasehold interest), unless the right or privilege is one *capable* of being held in fee simple or for a term of years absolute.
- (4) The matter of registration of land charges in respect of equitable interests has already been fully discussed and it seems unnecessary to cover the same ground again. It must suffice to say that a ticket entitling a person to see an entertainment or a series of entertainments would not appear to be such a right or privilege as last mentioned or to be capable of protection by registration of a land charge in respect thereof: see L. P. A., 1925, s. 4 (1).
- (5) In so far as *Wood v. Leadbitter* conflicts with the propositions above enunciated it would appear to be overruled, and *Hurst v. Picture Theatres, Ltd.* would appear to be good law. It is submitted that if the ticket were valid for a series of performances an injunction might be granted to enforce the ticket holder's right to take his seat. It has been urged that "a playgoer cannot insist on keeping his seat for the normal time if the play comes to a premature end or is never begun,

whether by the manager's fault or not : *Pollock on Torts* (14th ed.), p. 302; but that point is answered if the ticket is regarded as granting merely a right to use the seat during the performance or performances. If there is no performance or the performance ceases prematurely, the purpose of the licence ceases also. The question of damages (if any) for breach of contract is beside the point.

THE REGISTERED ESTATE.

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New Zealand.

The purpose of this article is to consider the nature of the "registered estate" under the Land Registration Act, 1925 (England), and this will be done from two aspects:—

1. Title.

2. Existence independently of the equivalent common law estate.

The English system of registered land was based originally on the Torrens system which has successfully satisfied changing conditions in Australia (a) and New Zealand for almost a century. The article will therefore conclude with a consideration of the decisions in these jurisdictions, which, in the absence of English authority, will be persuasive and apply by analogy.

It is necessary first to establish the conception and implications of the word "estate". It may mean either—

(1) the land itself, or

(2) a definite interest in the land and this may be (a) registered, or
(b) legal in the case of unregistered land.

In these pages the word will be used only in the second sense. The difference in the meaning is still of great importance although the width of the chasm between the two meanings was reduced by the 1925 legislation. This restricted both the number of registered and also legal estates thenceforth permissible to two and reduced equitable estates to the nature of equitable "interests". Thus, strictly speaking, equitable estates which would previously have been added to the classification above are no longer within it.

In the case of registered land prior to 1926 "transfer" and "estate" or "registered estate" took the place of "conveyance" and "legal estate" as used in unregistered conveyancing. The strict observance of this distinction in terms greatly assists in avoidance of confusion when registered and unregistered systems subsist concurrently. The Torrens system has always adhered to this distinction with resulting clarity and simplicity and so it is strongly submitted that in England strict observance of the distinction is essential at all times. It is, therefore, greatly to be deplored, as a retrograde step, that the Land Registration Act, 1925, has abandoned all precedents.

(a) The system originated in the State of South Australia in 1857, becoming law in 1858.

It has used indiscriminately the phrase "legal estate"—words which have long been understood, under the Torrens system to be referable only to unregistered conveyancing. Nevertheless, it recognises the difference in nomenclature as, for, example, in sections 18 (5), 19 (3) and 22 (3).

1. TITLE.

It is submitted that it is now beyond doubt, as the following pages will show, that in both England and Australasia, the title to registered land is a statutory title. It derives this statutory character from two sources :—

- (1) The express vesting contained in the statutory provisions as to registration, and
- (2) registration is the act of the State (by the hand of the Registrar). In the case of subsequent dealings, after first registration, the alteration of the register by the State effects the transfer or transmission.

The parties decide on the terms of their bargain: the statute determines the substance of the form in which the agreement shall be embodied, although slavish adherence to form is not required: one of the parties presents the documents for registration, but it is the State which alters the register pursuant to its interpretation of the documents presented. Until altered or rectified, the register remains effective (b). All the powers of disposition are vested in the registered proprietor until the removal of his name from the register. On registration, the act of alteration of the register of title divests the title of the existing proprietor and vests a statutory title in the succeeding proprietor. This may be a better title than that of his predecessor.

The vesting of a statutory title by registration is analogous in many ways to the fines which were in frequent use as early as the twelfth century. The "concord" was duly enrolled in accordance with the statute (5 Henry 4, c. 14) and was the chief record of the terms of settlement of the action. A similar analogy is to a vesting order of a Court for this is effective against all persons.

In England the cases of *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 655, C. A., and *Att.-Gen. v. Odell*, [1906] 2 Ch. 75, held *inter alia* that the registered title to land might become separated from the "legal estate" on an unregistered conveyance by the registered proprietor. These cases were decided upon the construction of the Land Transfer Act, 1875, s. 49 (which was repealed in 1925) and were overruled by the Land Registration Act, 1925, of which section 69 (4) provides :—

- "(4) The estate for the time being vested in the proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by this Act".

Both Lord Hanworth, M.R., and Lord Justice Romer recognised the existence of the statutory title to registered land in *Chowood, Ltd. v. Lyall*, [1930] 2 Ch. 156, 163, C. A. The defendant claimed rectification of the register and of the plaintiff's title to freehold land. At page 163 Lord Hanworth, M.R., says: "The plaintiffs claim to

(b) Compensation by the State is, of course, one of the essential features of a system of registered land.

succeed upon, what I may call, their statutory title. A plaintiff in ejectment must succeed upon the strength of his own title. The defendant is entitled to plead that he is in possession and leave the plaintiff by proof of the strength of his title to oust him. All that the plaintiffs have proved *prima facie* here is that they have a good statutory title—that they are registered as the first proprietors with an absolute title and therefore have vested in them an estate in fee simple in possession in the land”. Romer, L.J., agreed entirely (c).

As there is no other reported English decision (d) on the interpretation of the Land Registration Act, 1925, it is necessary to turn to the statute itself. Let us consider separately the two estates now permissible in land—(1) the estate in fee simple absolute in possession, and (2) the term of years absolute. Further, as the Act deals separately with first registration and subsequent registration (*i.e.*, by transfer or other means) it will be convenient if we also follow this division.

(1) *The estate in fee simple absolute in possession.*—The relevant sections of the Act are sections 5, 19, 20 and 69. FIRST REGISTRATION: Section 5 in express terms gives a statutory title to the first registered proprietor of a freehold estate (e). It vests in the first registered proprietor an estate in fee simple in possession together with all rights, privileges and appurtenances belonging thereto. SUBSEQUENT REGISTRATION: If, then, as it is submitted, the title is a statutory one on first registration it remains for decision whether this statutory nature is lost by subsequent dealings. Both sections 19 (1) and 20 (1) appear clearly to reaffirm the statutory nature of the title on subsequent dealings, and leave the matter free from doubt (f). Section 19 retains the registered estate in the registered proprietor until actual entry of a transfer on the register. Section 20 declares that registration of a disposition of an estate confers on the transferee the estate created or dealt with. FIRST AND SUBSEQUENT REGISTRATION: Section 69 (1) also gives to the registered proprietor of freehold land statutory rights which in effect amount to a statutory title (f). It

(c) It is possible that there are Australasian cases on the effect of proof of a registered title, but this point is not under review in this article.

(d) In the Irish case, *Rattigan v. Regan*, [1929] I. R. 342, the statutory title to registered land is referred to by Murnaghan, J.

(e) “S. 5. Where the registered land is a freehold estate, the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an estate in fee simple in possession in the land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to the following rights and interests . . . but free from all other estates and interests whatsoever, including estates and interests of His Majesty”.

(f) “S. 19 (1). The transfer of the registered estate in the land or part thereof shall be completed by the registrar entering on the register the transferee as the proprietor of the estate transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the registered estate; . . .”

“S. 20 (1). In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act, 1925, have been transferred if the land had not been registered, subject, . . . but free from all other estates and interests whatsoever, including . . .”

vests in the registered proprietor the legal estate in fee simple in possession, or the legal term created by the registered lease as the case may be.

(2) *The term of years absolute.*—The relevant sections of the Act are sections 9, 10, 11, 12, 20, 22, 23 and 69. Some of these sections have already been considered with reference to the estate in fee simple absolute in possession, and so it will not be necessary to set them out again. **FIRST REGISTRATION:** Section 9 differs slightly from the corresponding provisions of section 5 mentioned above. Under section 9 the “possession” of the leasehold estate is vested in the first registered proprietor (g). It is not clear why this difference should be made, for “possession” is not equivalent to “ownership”, although it may have the same result. It may be because the registered lessee has also his common law rights under the lease granted to him, or because possession is considered more appropriate to a lease and ownership to a fee simple. It is also not clear why a leasehold estate should be called a leasehold interest. This might be correct before registration of the lease, but the section deals with a lease registration of which has been completed. Sections 10, 11 and 12 declare that the effect of first registration of good leasehold, possessory and qualified titles respectively shall be substantially the same as that for absolute titles in section 9. **SUBSEQUENT REGISTRATION:** The provisions dealing with the effect of subsequent dispositions, however, as in the case of the fee simple mentioned above appear clearly to affirm the statutory nature of the title. Thus in addition to section 20 already considered and section 22 (which is in terms almost identical with section 19 also considered), section 23 places the matter beyond doubt (h). By this section registration of a transfer of a leasehold estate vests in the transferee, the estate transferred with all implied or expressed rights, privileges and appurtenances attached to the estate transferred. It seems that “implied or expressed” will be construed as “implied and expressed”. **FIRST AND SUBSEQUENT REGISTRATION:**

“S. 69 (1). The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act, 1925, or this Act or otherwise which has priority to the registered estate”.

(g) “S. 9. Where the registered land is a leasehold interest, the registration under this Act of any person as first proprietor thereof with an absolute title shall be deemed to vest in such person the possession of the leasehold interest described, with all implied or expressed rights, privileges, and appurtenances attached to such interest, subject to the following obligations, rights, and interests, that is to say, . . . but free from all other estates and interests whatsoever, including estates and interests of His Majesty”.

(h) “S. 23 (1). In the case of a leasehold estate registered with an absolute title, a disposition (including a subdemise thereof) for valuable consideration shall, when registered, be deemed to vest in the transferee or under-lessee the estate transferred or created to the extent of the registered estate, or for the term created by the subdemise, as the case may require, with all implied or expressed rights, privileges, and appurtenances attached to the estate transferred or created, including (subject to any entry to the contrary on the register) the appropriate rights and interests which would under the Law of Property Act, 1925, have been transferred if the land had not been registered, but subject as follows: . . . but free from all other estates and interests whatsoever, including estates and interests of His Majesty; and the transfer or subdemise shall operate in like manner as if the registered transferor or sublessor were (subject to any entry to the contrary on the register) absolutely entitled to the registered lease for his own benefit”.

As in the case of the fee simple, section 69 also gives to the registered proprietor of leaseholds statutory rights which in effect amount to a statutory title.

Although from the foregoing the existence of the statutory title is clear beyond all reasonable doubt, it will be interesting now to consider the decided cases of Australia and New Zealand. Decided on similar systems of registration despite some divergence by the English Act of 1925 it is possible that these cases have in some small measure influenced the administrative procedure of the Land Registration Act, 1925 (England). All these decisions are considered judgments, this being true, almost without exception, of all the reported decisions of these countries.

The earliest case is from Queensland: *Bailey v. Cribb* (1884), 2 Q. L. J. 42, in which Harding, J., held that registration of a forged transfer passed the estate to the transferee. At p. 44 he says: "Under the old system of conveyancing what is called the legal estate passes at law by the execution of the deed of conveyance. Under the Real Property Act of 1861 it is by the 43rd section specially enacted that no instrument shall be effectual to pass any estate until registration. The forged deed under the old system of conveyancing and the forged transfer in the form prescribed by the Real Property Act of 1861 before registration would have the same effect—that is to say they would both be nullities. But under the Real Property Act of 1861, s. 43, upon the registration of an instrument the estate intended to be thereby conveyed passes, so that the passing of the legal estate depends upon the act of registration and although the transfer would be void, yet when registered the act of registration being done by another hand, the legal estate passes by virtue of the act".

Gibbs v. Messer, [1891] A. C. 248, was an appeal from Victoria on a case of forgery. At p. 254 the Judicial Committee says: "The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title". This case was followed by a New Zealand appeal to the Judicial Committee, the point in issue being the indefeasibility of titles issued under the Land Transfer Act (New Zealand) and it was there said: "in the absence of fraud by the person who obtains registration, registration is conclusive and confers a good title on the registered owner": *Assets Co. v. Mere Roihi*, [1905] A. C. 176. Neither of these last two cases proceeds so far as a discussion of the nature of the title but each shows the manner of acquisition of title.

Crowley v. Templeton (1914), 17 C. L. R. 457, was an appeal to the High Court of Australia on the refusal of the Registrar to register a lease not in proper form. At p. 462, Griffith, C.J. (i) says: "It is common knowledge, after so many years, that the scheme of the Transfer of Land Act is to substitute title by registration for

(i) Griffith, C.J., and Isaacs, J., were two of the greatest of Australian Judges, and Isaacs, J., later became Chief Justice of the High Court of Australia.

title by deed. When, therefore, a man who is registered as proprietor of an estate in land wishes to deal with it, the only way to do so is by procuring an alteration of the register. The Act accordingly contains provisions enabling a person who is registered as proprietor of an estate or interest in land to transfer that estate or interest to another person. Section 89 provides that 'the proprietor of land or of a lease, mortgage or charge or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Sixth Schedule hereto; . . . Upon the registration of the transfer the estate and interest of the proprietor as set forth in such instruments or which he shall be entitled or able to transfer or dispose of under any power, with all rights powers and privileges thereto belonging or appertaining shall pass to the transferee', that is, it passes by the registration and not by the instrument". And at p. 436 he says: "But as I have already pointed out, the only way of dealing with land which is under the provisions of the Act is by alteration of the register and modes by which such alteration can be procured are prescribed by the Act. No other mode is authorised". Isaacs and Gavan Duffy, JJ., delivering a joint judgment at p. 466 say: "The Transfer of Land Act, 1890, makes provision for creating estates and interests evidencing their creation, in a manner otherwise unknown to the law. The new method is simpler, and where it is followed, certain legal consequences are prescribed by the Statute. But the benefit of the Act is dependent on its requirements being satisfied. For various specified transactions, appropriate forms are provided, and when these are followed and registered, and not otherwise, statutory effect attaches according to the nature of the transaction. To attain this end all rules of law inconsistent with the provisions of the Act are, by section 3, declared inapplicable".

Isaacs, J., reaffirmed this statement of the law in a dissenting judgment delivered jointly with Rich, J., in *The Commonwealth v. State of N.S.W.* (1918), 25 C. L. R. 325. This was an appeal to the High Court of Australia on liability for stamp duty on a transfer of land. At p. 341 Isaacs and Rich, JJ., say: "The State registration is something more than non-interference with rights. It confers title. It sometimes confers a better title than the transferor possessed. It provides as the Privy Council said in *Gibbs v. Messer*, [1891] A. C. 248, at p. 254, 'that everyone who purchases in *bona fide* and for value from a registered proprietor and enters his deed of transfer or mortgage on the Register shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title'. If the State in doing this deprives another of any interest in the land it compensates him, and for this purpose provides for an assurance fund (see *Papworth v. Williams*, 20 N. S. W. L. R. 280; [1900] A. C. 563). It is therefore quite different from a transaction dependent for its result merely on the agreement and acts of the parties themselves. It is not the parties who effectively TRANSFER the land but it is the State that does so and in certain cases more fully than the party could. In short, a transferee seeking registration of a transfer seeks State affirmation of his position".

This passage was referred to with approval by McCawley, J., in *O'Regan v. Commissioner of Stamp Duties*, [1921] St. R. Q., at

p. 297. The statutory conveyancing operation of the Torrens system has been affirmed throughout almost a century and other cases clearly setting out the view submitted are *West v. Read* (1913), 13 S. R. (N.S.W.) 575, *per Cullen, C.J.*; *Barry v. Heider* (1914), 19 C. L. R. 197, *per Isaacs, J.*; *National Trustees Executors Agency Co. of Australasia, Ltd. v. Boyd* (1926), 39 C. L. R. 84, *per Isaacs, J.*; and *House v. Caffyn*, [1922] V. L. R. 67, C. A., *per Cussen, J.*

[*To be continued.*]

TOWN PLANNING CONTRAVENTIONS.

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The presence on the near horizon of the Town and Country Planning Bill, 1947, with the prospect of the Royal Assent being given this Session, lends considerable interest to this involved but most important subject.

At the present time, Planning Authorities throughout the country are embarking on a spring-cleaning programme in an endeavour to bring to book persons who have carried out development, either in ignorance of the legal position or else in the hope that, either the development would not contravene the final Scheme, or the Authority would take no action in respect of the non-conformity. Owing to the exigencies of the war years much of this unauthorised development was either condoned or allowed to proceed unchecked. Once, however, the present administrative difficulties are removed, as in a great measure will be the case under the proposed new legislation, a considerable fillip to the extent of these activities may be anticipated.

Now that Town Planning is something more than a mere "idealist's dream", and with the forecast of land ownership becoming even more fraught with difficulties, it behoves everyone called upon to advise upon the implications of Town Planning to study this subject, which for the most part has hitherto so often been considered the sole prerogative of Local Government officials. The writer ventures to proffer the opinion that the former "nice" conveyancing points will pale into comparative insignificance. What will worry a would-be purchaser or developer are the restrictive conditions affecting land imposed by the Local Planning Authority. These may be found referred to in the Local Land Charges Register under the laconic expression "a resolution to prepare a Town Planning Scheme passed etc.". The official Certificate of Search at least says where one can find out about these things, but this should only be the start of the "investigation", which can well prove far more difficult than the most intricate points on title. Truly, therefore, it can now be said that planning law and compulsory purchase have between them created a "new conveyancing" of no less

importance to the private practitioner than were the Property Acts of 1925. This article is accordingly sub-divided into three parts: Part I, being an historical review; Part II, a summary of the present enforcement procedure; and Part III, the future position as envisaged in the new Town Planning Bill.

PART I—HISTORICAL.

The Town Planning Act of 1925 and the Town and Country Planning Act of 1932 enabled Local Planning Authorities to prepare a Scheme with the general object of controlling the development of land in the area to which the Scheme relates. The 1932 Act (which repealed the earlier Act of 1925), greatly extends the area coming within the scope of such a scheme.

The procedure is roughly as follows. Under section 6 of the 1932 Act, a Local Authority may decide to prepare a Scheme and they do this by passing a resolution. Then they have to submit the resolution to the Minister, who may or may not approve it, and, if he does approve it, certain consequences arise at once from the mere fact that a resolution has been passed. This, then, is the material date which is referred to in the Local Land Charges Register. By section 8, a Scheme prepared or adopted by the Local Authority requires approval of the Minister, and it will have to be laid before Parliament and certain proceedings may have to be taken before it becomes operative.

Before, therefore, a Scheme becomes finally effective, it may be postponed for many years and accordingly, as it is recognised that development must go on while the Scheme is being prepared and finally passed, provision is made by section 10 of the Act of 1932 for what is called "interim development of land". Under that section it is provided that "the Minister shall make a general Order with respect to the interim development, and for the purposes of the section this means development between the date on which the resolution takes effect and the date of the coming into operation of the Scheme. Such an Order may itself permit the development or may empower the Local Authority to permit the development in accordance with the terms of the Order.

The object of this legislation so far as the interim development is concerned was to provide that, once the Local Authority has embarked upon a course of Town Planning, people should not be allowed in the interim, *i.e.*, between the date of the resolution and the date of the Scheme coming into effect, to build, use or to develop land in such a way as will be contrary to the Scheme if and when it subsequently comes into effect. If this were not the case, such Schemes might be entirely wrecked by development in the interim period, which might render the Scheme nugatory. Parliament accordingly made provision for the Local Authority to control development during the interim period between the passing of the resolution and the ultimate perfection of the Scheme. [What is meant by the term "development" is adequately defined in section 53 of the Act.] What it omitted to do, however, was to ensure that no interim development should, in fact, take place without permission, by making it an offence so to do.

Then the Town and Country Planning (Interim Development) Act, 1943, was passed. This Act, among other things, put the whole

of the land in England and Wales into the position that it was deemed to be the subject of a resolution, whether a resolution had in fact been passed or whether it had not; in other words, all land now is to be regarded as though the Town and Country Planning Act, 1932, and some Scheme had been applied to it. In section 5 of this Act are to be found also certain more positive powers of enforcement which will be referred to in Part II.

Finally, we have the Building Restrictions (War-Time Contraventions) Act, 1946, which provides that, where any Authority intends to take steps to enforce building law or planning control, then the person affected must be given an opportunity to have his case determined upon its merits by such Authority under the procedure laid down in that Act. Once a final determination has been made to the effect that the development, etc., does not comply with planning control nor can be deemed, for the purposes of that Act, to comply, then the normal enforcement procedure can be put into effect. The intention, however, is clearly to create a buffer between the over exuberant Authority and the property owner who has carried out development or commenced a user, often in the national interest, during the war period and requires a reasonable time to adjust himself to post-war conditions.

It will now be realised that development can fall within one or other of two classes. It may, on the one hand, be classed as "protected" inasmuch as the normal enforcement procedure cannot apply and the removal of the buildings, works, etc., can only be accomplished and user of land prohibited on payment of compensation. On the other hand, it may fall in the class of "contravening development", in which case the developer may find that his property can be dealt with in the manner to be outlined in the remaining parts of this synopsis. It is of vital importance, therefore, to decide into which of these two classes the development in question lies.

Up to the time when the resolution to prepare a Scheme becomes operative (*i.e.*, the date of the Minister's approval of the resolution or November 22, 1943, whichever is the earlier) "all existing buildings, existing works and existing uses", as defined in the interpretation clause (section 53 of the 1932 Act) come within the "protected" category. Similarly, development specifically authorised under the General Interim Development Orders which have been passed from time to time, *viz.*: the Interim Development Order of 1933 and the Interim Development Orders of 1945 and 1946 respectively and development for which an interim development permission has been granted by a Local Authority pursuant to such Orders, are placed in the "protected" category so long as such permissions remain in force. Likewise, determinations made under the provisions of the Building Restrictions (War-Time Contraventions) Act to the effect that the development can be deemed to comply with planning control puts the case within this class for such time as is allowed under the determination and provided also that any conditions imposed are observed. A reference to section 53 will, however, indicate that certain buildings, works, etc., erected after the resolution stage or users commenced subsequent to that date may in fact come within the category of "existing", *e.g.*, because they are extensions or replacements of existing buildings or are classed as a "similar user". On the other hand, it is equally possible for a

“protected” development to become relegated from the privileged class into the “contravening” category on the expiration of any temporary permits, the breach of any conditions imposed on the grant thereof, or on a break in the user, as explained in section 53, *e.g.*, discontinuance for eighteen months; but see also section 46 of the Town and Country Planning Act, 1944, as regards discontinuances, etc., in the war period.

If, therefore, the development concerned has been carried out during the period when the land was subject to a resolution to prepare a Planning Scheme and no interim development permission has been granted, then, normally, this development will constitute a contravention and enforcement procedure may apply, if, in fact, the development does not conform to the proposals intended to be incorporated in the final Scheme.

PART II—SUMMARY OF THE PRESENT ENFORCEMENT PROCEDURE.

It is first necessary to classify the contravention according to the date of its occurrence, as there is a considerable diversity of treatment under the present legislation. The periods are as follows:—

Period 1. Post-resolution to July 22, 1943.

Period 2. July 22, 1943, to March 26, 1946.

Period 3. March 26, 1946, to the “Appointed Day” under the 1947 Bill.

Period 4. Planning Scheme in the operative stage under the 1932 Act.

Period 1. Post-resolution to July 22, 1943.

At the present time as regards contraventions in this category there is no effective action which can be taken, and the Local Planning Authority can only, like the “hot gospeller”, warn of the wrath to come and hope that the recalcitrant will amend his ways and conform with the provisions of the draft Scheme.

In districts which did not take advantage of the 1925 or 1932 Town Planning Acts to pass a resolution to prepare or adopt a Scheme and where planning control consequently only became effective for the first time in 1943 by virtue of the Town and Country Planning (Interim Development) Act of that year, any development taking place before November 22, 1943, will come into the “protected” category as an “existing building, works or user”, as, of course, no planning control was applicable prior to that date.

When the 1932 Act was passed, it was no doubt thought that the interim period would be of short duration, and it was considered that the enforcement control contained in section 13 of that Act (which applies immediately the final Scheme becomes operative) would be sufficient to meet the purposes. It could hardly have been envisaged that the interim period might well take twenty years or so as has in fact been the case in many areas. During this period, therefore, the only deterrent is the possibility of pecuniary loss when the Scheme reaches the operative stage, if development is then found not to conform with the provisions actually contained in the final Scheme.

Period 2. July 22, 1943—March 26, 1946.

As it was realised that the Act of 1932 did not enable the Interim Development Authority to take immediate action in respect of any development carried out otherwise than in accordance with the Interim Development Order or any permission granted under such Order, it was considered necessary to give some more positive control in the interim period before the section 13 procedure could apply. Consequently section 5 of the 1943 Act provides that "if while a resolution to prepare a Scheme is in force any development of land within the area is carried out after the commencement of the Act (*i.e.*, July 22, 1943), otherwise than in accordance with the terms of the Interim Development Order or of permission granted under that Order, then the Interim Development Authority may, if satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the Scheme, (a) where the development consists of the erection, construction or the carrying out of any building or work, remove or pull down the building, etc., and (b) where the development consists of any use of lands or any buildings thereon, by Order prohibit that use and, where necessary, reinstate the land". Then there is a provision in Schedule 1 providing that "if any person served with a Notice desires to dispute any allegation contained therein, he may, within twenty-eight days appeal to a Court of Summary Jurisdiction on the grounds that the Interim Development Authority are not entitled to take the proposed action for the reasons specified in the Notice". This section, however, must be read in conjunction with the provisions of the Building Restrictions (War-Time Contraventions) Act, 1946, which covers contraventions occurring in the period from September 3, 1939, to March 26, 1946. Before the section 5 procedure can be resorted to either a "determination" must be made under the provisions of the 1946 Act or the person must be given an opportunity of submitting his case for "determination". Moreover, enforcement *steps must be commenced* within a period of twenty-eight days of the final "determination", failing which the whole of the 1946 Act procedure must be repeated (section 3 (1)). There is a right to a personal hearing before the Local Authority make their "determination" and the Circular sent out by the Minister of Health (137/46) makes it clear that reasonable latitude should be afforded where development, although not strictly complying with planning control, constitutes no great harm at present and can accordingly be permitted to remain until such time as planned development in the neighbourhood becomes an accomplished fact. Furthermore, if steps are not taken as laid down by the 1946 Act within the five year period from the passing of the Act, *i.e.*, by March 26, 1951, the development concerned becomes established and falls within the "protected" category. If, however, the "determination" goes against the property owner or developer (he has a right of appeal to the Minister of Health) steps can then be taken as laid down in section 5 of the 1943 Act. The procedure regarding notices, etc., is set out in the First Schedule to that Act. It should be noted, however, that the Local Authority in taking action under this section *must* have regard to the provisions which are then intended to be

included in the Planning Scheme. There is a right of appeal to the Courts of summary jurisdiction and thence to quarter sessions or appeal by case stated to the High Court. An extremely lucid guide to the actual working of the section 5 procedure is to be found in the judgment of Lord Chief Justice Goddard in the case of *Taylor v. Brighton Corporation*, [1946] K. B. It is clear that, provided the Authority exercise their very wide discretion judicially and have regard for provisions genuinely intended to be incorporated in the final Scheme, which provisions must not be *ultra vires*, the Scheme, then there is no power giving the Courts the right to question the necessity or otherwise for the proposed action. They may, however, determine whether the requirements set out in the formal Notice are excessive for the purposes of bringing the development into line with the planning proposals contained in the draft Scheme. An aggrieved party has, however, an alternative line of action inasmuch as he can appeal to the Minister of Town and Country Planning against the refusal of the Local Authority to grant an interim development consent. Presumably, however, an application for and refusal of such permission would be a pre-requisite to any such appeal. Subject to the above, anyone who disregards the Order is liable on summary conviction to a fine not exceeding £50 with a daily penalty of £20.

Period 3. March 26, 1943—Appointed Day.

Here the provisions of the 1946 Act do not apply, and the Local Authority are accordingly enabled to go straight ahead with the section 5 procedure once satisfied that the contravention has occurred subsequent to March 26, 1946.

Period 4. Operative Schemes.

In the areas of those Authorities, there are only seventy-four in the country, where the Planning Scheme has reached the final and operative stage, no great difficulty should be experienced. The Scheme will state whether or not the development in question conforms, and, if it does not, then the powers to regularise the position are clearly laid down in section 13 of the 1932 Act. Here, therefore, one will find provisions enabling the Authority to remove, pull down and alter offending buildings and to prohibit the use of land in a manner which contravenes any provision of the Scheme. This section relates both to "protected" and "contravening development", although, of course, adequate safeguards are given to ensure that compensation is paid to persons whose development comes within the "protected" class. It is unlikely that any further draft schemes will reach the operative stage in view of the imminence of the new Town and Country Planning Act.

SUMMARY OF PART II.

It will be concluded from what has been said above that there are many administrative difficulties and pitfalls in the enforcement procedure provided under existing legislation. Thus, on the one hand, clandestine development has not been effectively discouraged because it has never been obligatory upon anyone to obtain an interim develop-

ment permission before going ahead with the works or user in question. The fact that this is at the "owner's risk" has proved to be an insufficient deterrent. On the other hand, Authorities have been reluctant to take proceedings especially where considerable sums of money have been spent on erecting substantial buildings. The greatest difficulty, however, is encountered where the contravening development in question has its origin in, say, period 1, and continues to grow in intensity throughout the remaining periods, as, for example, where a small business user is commenced in a residential zone soon after the date of the resolution to prepare a Scheme and this business develops throughout the subsequent periods discussed above. It may be extremely difficult to obtain evidence as to when the contravention actually commenced and, as has been pointed out, there is no effective manner in which one can deal with a contravention which first occurred prior to July, 1943. It is for this reason, therefore, that hopes are centred on the new Town Planning Bill, where one uniform procedure is set out to deal with contraventions and provisions of a more positive nature are provided to ensure that future development does not commence except with the express consent of the appropriate Authority. In the future it will be an offence, in the penal sense of the word, to carry out development without permission.

PART III—THE TOWN AND COUNTRY PLANNING BILL, 1947.

When this Bill becomes law, it will repeal both the 1932 and 1943 Acts, together also with all operative Schemes and Orders. The enforcement procedure is set out in clauses 21 and 22 of the Bill, where it will be found that control will no longer remain quiescent but that effective powers are given to the Local Planning Authorities to regulate development both past and present in conformity with the "development plan", including the right to take steps in the interim stage whilst the new plan (referred to in clause 5) is being prepared. The second major change is that the county councils and the county boroughs will normally be the Local Planning Authorities entitled to exercise these powers, although they have a right to delegate these functions to the non-county boroughs and urban districts, who, at the present time, are interim development authorities under the 1932 Act. It must be apparent that unless delegation in fact takes place, the future control is likely to be ineffective until the new Authorities get organised and sufficient staff is trained and available to deal with the flood of contraventions requiring attention.

Clause 70 (1) states that "where at any time *before* the 'Appointed Day' any works on land have been carried out or any use of land has been begun in contravention of previous planning control . . . the provisions of clauses 21 and 22 apply in the same manner as they apply to development carried out after the 'Appointed Day' without the grant of permission in that behalf given under the provisions of the Act". The proviso to this sub-clause goes on to state "an Enforcement Notice shall not be served . . . at any time after three years of the 'Appointed Day' in respect of any such contravention unless occurring within the period covered by the Building Restrictions (War-Time Contraventions) Act, 1946, when the provisions of this latter Act

apply". In other words, present contraventions must be dealt with within the three year period, but war-time contraventions must be dealt with by March 26, 1951, or within such extended period as may be determined under the provisions of the 1946 Act.

The Bill defines what is meant by the term "a contravention of planning control" when in the interpretation clause (clause 107 (3)) it states "*works* on land shall be deemed for the purposes of the Act to have been carried out and *user* of land shall be deemed for these purposes to have been begun in contravention of previous planning control :—

- (a) where at the material time the land was subject to a resolution to prepare a Planning Scheme, if they were carried out or begun otherwise than in accordance with the permission granted by or under the Interim Development Order; or
- (b) where at the material time the land was subject to such a Scheme, if they were carried out or begun otherwise than in conformity with the provisions of the Scheme".

It seems rather strange that the words "works and user" should be used in place of the single word "development", particularly since the interpretation clause does not explain what is meant by either term, whereas, of course, section 53 of the 1932 Act carefully explains what is meant by the word "development". Note that there is now no distinction in procedure between contraventions occurring before or after July 22, 1943, but that the War-Time Contravention Act still applies.

Once, however, it has been determined that the subject-matter in question constitutes "a contravention of previous planning control" it is simply necessary to refer to the enforcement procedure in clauses 21 and 22, the short effect of which is as follows :—

- (1) An "Enforcement Notice" is served on the owner AND the occupier of the land and buildings in question. This Notice MUST specify the alleged contravention and what is required to regularise the position; it MAY require the discontinuance of the offending user and the demolition of works and buildings and MAY specify any necessary reinstatement.
- (2) Twenty-one days must elapse before any further steps are taken, during which time an application may be made by the parties concerned for permission to retain any works or buildings or for the right to continue any existing use of the land. Until any such request has been "finally determined" again no steps can be taken on the Notice. This procedure is somewhat analogous to that of the 1946 Contraventions Act except that there is no right to a personal hearing and no appeal to Ministerial level.
- (3) In addition, there is a right of appeal within the twenty-one days to a Court of summary jurisdiction. The powers of this tribunal are, however, limited to an inquiry into the facts as to whether or not a development permission has actually been granted, or is in fact required, as the case may be. If the permit was granted subject to conditions, the Court may

decide whether they have or have not been complied with. The Court can further determine whether or not the requirements stated in the Notice are excessive for the purpose of restoring the land to its condition before the development took place, but not, it would seem, as to whether planning control should or should not be enforced at the particular time in question; this discretion is unfettered. There is a right of further appeal to quarter sessions. The Courts, therefore, are only concerned to see that planning is enforced according to law.

- (4) After the specified period has expired, should the requirements stated in the Notice remain uncomplied with, the Local Authority can take the necessary steps themselves at the expense of the person in default (clause 22). There is no further right of appeal.
- (5) In addition, any person acting in contravention of the Notice is guilty of an offence and is liable on conviction to a penalty of £50 and a daily fine of £20 until the contravention ceases.
- (6) Where the contravention has taken place between September 3, 1939, and March 26, 1946, the procedure prescribed by the Building Restrictions (War-Time Contraventions) Act must be complied with before any "Enforcement Notice" is served, but in this case there is no further right to a "determination", as mentioned in (2) above.

In determining the expediency for enforcing planning control, the Authority is required (clause 21 (1)) to have regard to the provisions of the development plan AND to other material considerations, but in the interim period before the plan is prepared, then regard must be had to any directions which may be given by the Minister, failing which the Authority "shall have regard to the provisions which in their opinion will be required to be so included for securing the proper planning of the area" (clause 34). Note that, if the contravention took place during the "war period", steps must be taken by March 26, 1951, and in other cases within three years of the "Appointed Day", with appropriate extensions where the contravention is only deemed to begin as and from the termination of a temporary licence or on the breach of a condition.

Before leaving clause 70 it should be noted that the Local Planning Authority have the power to regularise the position by granting a development permission with retrospective effect; this permission may be either unconditional or it may be granted limited as to time or subject to conditions. The "Enforcement Notice" is then held in suspense (clause 70 (3)). No development charge is payable in respect of any such retrospective provisions (clause 70 (6)). Likewise, of course, no compensation is payable by the Local Authority for depreciation caused by the enforcement.

UNAUTHORISED DEVELOPMENT AFTER THE "APPOINTED DAY".

For the definition of "contraventions" occurring after the new Bill becomes operative, we must refer to clause 21 (1), which permits the putting into operation of the "enforcement procedure" where "any

development” is carried out after the “Appointed Day” without permission, or where conditions subject to which consent was given, are not complied with or the time limit expires. Here it will be seen that the word “*development*” is used instead of the words “*works on land*” or “*use of land*” contained in clause 70 (1). Again, “*development*” itself receives a new definition in clause 10 of the Bill which should be contrasted with the meaning given to it in section 53 of the 1932 Act. Obviously there has been an attempt to “plug the holes” found in the earlier definition—whether this will be effective or will simply open others remains to be seen. In particular, clause 10 expressly provides that maintenance works, not materially affecting the design or external appearance of buildings, and the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such shall not be regarded as development; likewise use of buildings or land for the purposes of agriculture or forestry. The former use has a wide interpretation (see clause 107). The Minister will doubtless also issue Orders from time to time (somewhat similar to the existing Interim Development Orders) exempting development of the class specified in such Orders from the necessity of obtaining a development permission.

On the other hand, sub-para. (3) and (4) of clause 10 state in effect that henceforth the conversion of a single dwelling-house into flats, the deposit of refuse or waste materials on land, and the use of the external part of a building for the display of advertisements shall all in future be regarded as a “material change of user” involving the necessity for planning permission. The last-mentioned covers the case of *Mills and Rockleys, Ltd. v. Leicester City Council*, [1946] 1 A. E. R. 424, where it was suggested that the use of the gable end of a house for the display of advertisements did not entail a material change of user of the building.

In sub-para. (5) of clause 10 will be found a mention of certain “uses of land” for which no development permission is required notwithstanding that the use in question might otherwise be construed as a material change. As drafted, this sub-para. would appear to be most ambiguous and opens many loopholes from the would-be developer’s point of view. For instance, it is stated where land on the “Appointed Day” is being used temporarily for a purpose other than its *normal* use, a resumption for the last-mentioned purpose does not require a permission (clause 10 (5) (a)). Then again, where land is unoccupied on the “Appointed Day”, it can be used for the purpose for which it was *last used* within a ten year period without permission. It would, it is submitted, have been a wise precaution to have qualified this sub-para. by stating that it was to be without prejudice to any action under clause 70 relating to existing development which contravened previous planning control. Alternatively, “authorised use” would have been better than “normal use” in sub-para. (5) (a) and in sub-para. (5) (c) it should be made clear that this does not entitle anyone to resume a contravening user.

Where a development permission is required by virtue of clause 10 (1) and no exemption can be obtained by virtue of sub-clauses (2) or (5) of this section, then if any development of land

carried out after the "Appointed Day" without permission, or where any conditions, subject to which such permission was granted, are not complied with or the time limit expires and the works remain or user continues, then the "Enforcement Notice" procedure set out in clause 21 applies. Once again the enforcing authority must have regard to the provisions of the development plan, or, in the interim stage, the directions of the Minister, or the provisional requirements of the plan (clause 34), as the case may be.

It is most unlikely, however, that there will be a spate of contraventions in the future, as it is now mandatory to obtain a permit before development proceeds and the development charge (if any) must be paid or otherwise secured before any "operations" are carried out (clause 62 (1)). Thus it may well now be illegal to carry out works etc., without permission, and penalties up to double the amount of the development charge are provided for in clause 67 (3) and may be claimed by the Central Land Board. This alone should be a very real deterrent to would-be unauthorised development.

Space does not allow for any mention of the machinery available for dealing with conforming users, *i.e.* "existing buildings", "works" and "uses" in the pre-resolution stage of planning, and other operations similarly protected, but ways and means are provided in the new Bill for bringing these matters into conformity with the development plan, albeit only on paying the appropriate compensation, and the Minister of Town and Country Planning has to confirm any Order made in this regard. The procedure is set out in clauses 23 and 24, and, in certain circumstances, a person whose land is depreciated by the Local Authorities' action may compel a purchase of his land and buildings by the service of a "Purchase Notice", as to which see clause 17 of the Bill.

Finally, a word should be said about agreements made under section 34 of the 1932 Act. These were generally agreements between Local Authorities and estate developers, and constituted, in effect, small planning schemes for the land covered by the agreement. Any restrictive covenants and conditions contained in the agreement, if registered in the local Register, bind the land and are enforceable against successors in title of the original covenantee. At the present time, it is thought that many authorities find these agreements a valuable aid in the enforcement of planning control inasmuch as action can be taken against the contravener by originating summons for an injunction, mandatory or otherwise, according to the ordinary law applicable to restrictive covenants on land. All these agreements are cancelled upon the coming into operation of the 1947 Bill (Ninth Schedule, section 7). This, it is submitted, is a retrograde step because the powers contained in these agreements are often far more extensive than anything available under general planning law.

THE CONCEPTION OF MARRIAGE IN ENGLISH LAW.

By J. G. FLEMING, M.A.

I

Several decisions were added to the law reports last year which have substantially changed the one-time orthodox conception of the marriage relationship in English law and necessitate a complete reorientation. It is thought appropriate to devote some attention to this subject in the pages of a journal primarily designed for the conveyancer, since its importance is by no means restricted to the narrow confines of matrimonial causes within the framework of private international law. The property lawyer cannot disassociate himself from the conception of the marriage relationship since both in *inter vivos* and testamentary dispositions the meaning of "wife", "children", etc., are apt to be of singular significance.

The close connection between family law and the jurisdiction of the ecclesiastical courts (until 1857) (a) resulted at an early date in the refusal of the English Courts to predicate the definition and consequences of "marriage" to any but a Christian connubial relationship. The *locus classicus* is found in the judgment of Lord Penzance in *Hyde v. Hyde* (b): "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one wife, to the exclusion of all others". In that case the husband petitioned the High Court for the dissolution of a marriage celebrated in Utah in accordance with the formalities and belief of the Mormons, a sect legally practising polygamy in that state of the U.S.A. In rejecting the petition on the ground that the matrimonial law of England was not designed to afford relief to marriages other than those which exhibited the character of a Christian union (c), the learned Judge expressly passed the observation that "this Court does not profess to decide upon the right to succession or legitimacy which it might be prepared to accord to the issue of polygamous marriages" (d). Speculations have, therefore, been confined to the extent to which the Courts would recognise the consequences of a marriage which, for purposes of divorce, nullity and other matrimonial relief, would be stigmatised as polygamous.

Before proceeding to an examination of this problem, it is necessary to restate briefly the criteria which determine the monogamous or polygamous character of a marriage.

II

(1) The intention of the parties is totally irrelevant (e). Thus the marriage of Indians in accordance with Mohammedan rites is not

(a) See Potter, *Historical Introd.*, 192-5.

(b) (1866), L. R. 1 P. & D. 130, 133.

(c) Cf. also Lord Greene, M.R., in *Baindall v. B.*, [1946] P. 122, 125. For the converse proposition that a form of divorce designed for polygamous marriages is not capable of dissolving a monogamous union, even though in conformity with the law of the domicile, see *R. v. Registrar of Marriages, Hammersmith*, [1917] 1 K. B. 634.

(d) At p. 138.

(e) This found a novel application in *Wolfenden v. W.*, [1946] P. 61, where a common law marriage was upheld, although the parties, at the time of their marriage,

rendered monogamous by the firm intention on the part of the "husband" to refrain from exercising his rights under Mohammedan law to increase the number of his spouses to four. Similarly, the marriage of two English domiciliaries in Persia in accordance with the local form will be polygamous (f). It is true that Lord Brougham in *Warrender v. Warrender* (g) appeared to entertain a different view, but this is entirely unsupported by subsequent decisions which have established beyond a vestige of doubt that the bare intention of the parties at the time of the marriage ceremony or the mere fact of keeping the marriage *de facto* monogamous has no effect on its original character (h).

Furthermore, the circumstances that the parties, after going through a form of marriage which implied the husband's polygamous rights, were subsequently converted to the belief of a monogamous sect, cannot affect the original legal character of their relationship (i).

(2) The domicile of the parties (k) is likewise irrelevant. This conclusion is based on the assumption that monogamous and polygamous unions are essentially different institutions and that characterisation must proceed with reference to the form of the ceremony rather than the incidents of the relationship (l). Apart from Lord Brougham's pronouncement (m) there is no authority for the proposition that a marriage contracted in a polygamous country and in accordance with the local domestic form is rendered monogamous by the fact that both parties were domiciled in England. On the contrary, *Hyde v. Hyde* has established beyond doubt that the marriage of a domiciled Englishman with a native woman celebrated in Utah in conformity with the Mormon ritual is polygamous (n). Conversely, there is abundant authority that a person domiciled in a country admitting polygamy would, by marriage in England before a marriage registrar, enter into a monogamous union (o).

(3) It is usually stated, therefore, that the character of the marriage is determined by reference to the *lex loci contractus* (p).

were under the impression that additional formalities were required to render it completely effective.

(f) But note the question of capacity to enter such marriages. *Vide infra*.

(g) "An Englishman marrying in Turkey contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman and only residing in Turkey and under Mohammedan law accidentally and because he marries with a view of being a married man and having a wife in England, and for English purposes: consequently the incidents and effects, nay, the very nature and essence, must be ascertained by the English and not by the Turkish law" (2 Cl. & F. 488, 535).

(h) *Hyde v. Hyde, Re Bethell*, 38 Ch. D. 220, etc.

(i) Cf. Barnard, J., in *Mehra v. M.* (1946), 174 L. T. 63, 64. In *Lord Sinha's Peerage Claim* (1939), House of Lords Report of Proceedings, July 25, Lord Maugham considered the first baron Sinha's subsequent embrace of the Brahma Samaj faith totally irrelevant to the eldest son's claim to the barony, but cf. Lord Asquith. See *infra*.

(k) Or husband, *quare*?

(l) Such as capacity, divorce, etc. See W. E. Beckett in 48 L. Q. R. 341.

(m) See note (g).

(n) It is noteworthy, however, that there is no direct judicial authority to cover the case where both parties were domiciled in England. All decisions concerned marriages where either one or both spouses had a domicile in a polygamous country.

(o) *Chetti v. Chetti*, [1909] P. 67; *R. v. Naguib*, [1917] 1 K. B. 359; *R. v. Registrar of Marriages, Hammersmith*, [1917] 1 K. B. 634; *Lendrum v. Chakravati*, [1929] Scot. L. T. R. 96.

(p) Cheshire, p. 321; Beckett, *l.c.* 356.

This, however, requires further qualification; it is more correct to state that reference must be had exclusively to the nature of the ceremony as governed by the *lex loci contractus*. An alternative procedure is frequently available. This was recently brought into relief by Barnard, J., in *Mehtha v. Mehtha* (q) when granting a decree of nullity of the marriage contracted by an Indian and an Englishwoman in India in accordance with the rights of the monogamous Arya Samaj sect. The learned Judge refused to accede to the argument that, because by conversion to orthodox Hindu religion the husband would have been free by Indian law to increase the number of his wives, the marriage must be treated as polygamous. "All I have to look at is the inception of the marriage . . . the Court cannot look beyond that. The fact that it may be got rid of or altered does not make any difference" (r). This principle is applicable not only to the question whether a marriage is "to the exclusion of all others" but also whether it is a "union for life" (s).

Marriages contracted in England before a registrar are of course monogamous, but a marriage celebrated at the Mosque in Woking would be polygamous (t). English couples desirous of entering wedlock in an oriental country where polygamy is practised have two alternatives. They may either (a) avail themselves of the Foreign Marriages Act, 1892 (u), or (b) enter a common law marriage. In *Wolfenden v. Wolfenden* (a), previous doubts (b) as to the propriety of this form were dissipated. Lord Merriman, P., upheld a marriage celebrated at a Scottish Church in the Chinese province of Hupeh, although the ceremony was conducted by a priest who was not episcopally ordained. The contrary rule in the fortuitous decision of *R. v. Millis* (c) is restricted to England and Ireland, so that it is now open to British subjects to contract an "informal" marriage, at any rate in countries which do not specifically render such marriages void (d).

(4) Although it is customary to stress the Christian element of monogamous marriages, the religion or race of the parties is not a relevant consideration, as long as the ceremony implies a union for life, to the exclusion of all others. Thus a Japanese marriage does not fall under the present rule (e).

III

Two additional principles require elaboration—(i) as regards formalities, the marriage must conform to the requirements of the *lex*

(q) (1946), 174 L. T. 63.

(r) It follows quite logically that an originally polygamous marriage does not become monogamous by change of the parties' faith—see *Lord Sinha's Claim*.

(s) *Nachimson v. N.*, [1930] P. 217, where it was established that Soviet marriages were entitled to recognition in this country, in spite of the facilities for divorce afforded under the Marriage Laws of 1918 and 1926. The right of unilateral divorce without resort to Courts of law was abolished in the U. S. S. R. in 1944.

(t) Such a marriage is apparently not invalid in spite of its non-compliance with Lord Hardwicke's Act—*Re Ullee* (1885), 53 L. T. 711; *In the Estate of Belshah*, Times Newsp. Dec. 1926–Jan. 1927.

(u) 55 & 56 Vict. c. 23.

(a) [1946] P. 61.

(b) See Cheshire, 329–333.

(c) (1843–4), 10 Cl. & F. 534.

(d) *Catterall v. C.* (1847), 1 Rob. Eccl. 580.

(e) *Brinkley v. Att.-Gen.* (1890), 15 P. & D. 76.

loci contractus (f). Thus, non-compliance with an *obligatory* ceremony will render a purported marriage null and void, at any rate in the *forum loci contractus*. If, for example, Lord Hardwicke's Marriage Act (g) were interpreted as providing an exclusive form of marriage in England, irrespective of the religious belief of the parties, a Mohammedan ceremony at the Mosque in Woking would be nugatory, irrespective of the element of polygamy. This conclusion, however, does not appear warranted; (ii) the parties must, by the law of their pre-marital domicile, be capable of contracting the marriage (h). Two questions arise in this connection:—

(a) Is a person domiciled in England capable of entering into a polygamous marriage? It is not clear whether this element had until comparatively recent times received adequate consideration on the part of the Courts (i). Although a vital issue in *Re Bethell* (k), Stirling, J., ostensibly ignored the circumstance of the English domicile of the husband and proceeded on the general ground that the marriage, being polygamous, was incapable of producing legitimate offspring, so as to allow the daughter to take as the "lawful child" under an English settlement. The current explanation of this decision (l), however, is based on the observation that the "husband", by virtue of his incapacity by English law, could not legally enter a polygamous marriage with a native African woman in accordance with the rites of the Baralong tribe. In the leading South African decision of *Seedat's Executor v. Master* (m), the validity of the second marriage in India of a Mohammedan domiciled in Natal was rejected on the express ground that the law of his domicile of choice disallowed polygamous unions. This principle recently received implicit recognition by the House of Lords in the *Sinha Peerage Claim* (n), where Maugham, L.C., expended considerable emphasis on the Indian domicile of the parties as an essential factor to the validity of their Hindu marriage (o).

(b) Is a person who has a polygamous personal law capable of entering a monogamous marriage? The affirmative answer is implicit in the *Hammersmith Marriage Case* (p), *R. v. Naguib* (q), and was positively established in *Chetti v. Chetti* (r), where a Hindu, married to an Englishwoman in England, petitioned the High Court for nullity on the ground of his alleged incapacity. This was rejected on the ground

(f) *Berthiaume v. Dastous*, [1930] A. C. 79.

(g) (1753), 26 Geo. 2, c. 33.

(h) *Brook v. B.*, 9 H. L. C. 194; *Re Paine*, [1940] Ch. 46.

(i) See, e.g., *In the Estate of Belshah*, discussed below.

(k) (1887), 38 Ch. D. 220.

(l) Sir D. Fitzpatrick, *Journal for Soc. of Comparative Legisl.*, vol. II (N.S.) 359, 384; *W. E. Beckett, l.c.* at p. 347.

(m) [1917] A. D. 302.

(n) [1946] 1 A. E. R. 348-9 (Committee of Privileges).

(o) This is confirmed by the American Restatement, para. 132 (a).

(p) [1917] 1 K. B. 634.

(q) [1917] 1 K. B. 359.

(r) [1909] P. 67.

that (1) capacity to marry a plurality of wives does not exclude capacity to marry one spouse, and (2) such incapacity, assuming its existence, is of a penal nature and not entitled to recognition in this country (s).

Thus there is authority for the rule that a man or woman (t) whose personal law does not admit polygamy is under an incapacity to enter such a marriage, but that a person with a polygamous domicile cannot in this country be heard to plead his incapacity to marry in accordance with a monogamous ceremony.

IV

We are now in the position to inquire whether a polygamous union is capable of producing primary and secondary consequences, or whether its non-recognition in the field of matrimonial relief entails its total invalidity for all purposes.

Does the fact that the English High Court is unable to grant decrees of dissolution (u), nullity (a), or restitution of conjugal rights (b) to spouses of a "non-Christian" union preclude the recognition of its existence when the validity of a subsequent monogamous marriage is at issue? (c). To do so would, *inter alia*, produce these undesirable consequences (d) :—

- (1) The respondent, lawfully married to a Hindu wife in India, would be free to remarry an English wife in this country who would be entitled to petition for dissolution on the ground of her husband's adultery, if the latter chose to cohabit at any time with his first "spouse", whether such cohabitation took place in England or abroad.
- (2) It would encourage polygamy, not curb it.
- (3) If the respondent left his Hindu wife, she could obtain an order from an Indian Court for restitution of conjugal rights. At the same time, the "husband" would be under an obligation to reside with his English wife.

Fortunately, the Courts have found the means to avoid such drastic propositions. An apparent distinction has been suggested in this connection between a person "married" within the meaning of section 57 of the Offences against the Person Act and a person whose subsequent monogamous union is impugned on the ground of a previous subsisting "marriage". In *Scrini Vasan v. Scrini Vasan* (e), Barnard, J., granted a decree of nullity to a female petitioner on the ground that, at the time of her marriage in England to the respondent, a Hindu, the latter was already married to a woman in Travancore State and that marriage was still subsisting (f). The argument that the union, being polygamous, was incapable of preventing a subsequent mono-

(s) See also *Lendrum v. Chakravati*, [1929] Scots L. T. R. 96.

(t) For a modified but unsubstantiated view regarding a woman's capacity, see *W. E. Beckett, l.c.* pp. 360-1. The incapacity of the second wife with an English premarital domicile was not discussed in *Re Ullee* (1886), 53 L. T. 711.

(u) *Hyde v. Hyde*.

(a) *Per* Barnard, J., in *Mehta v. M.* (1946), 174 L. T. 63, 64.

(b) *Ardasee Cursetjee v. Peroze Boye*, 10 Moo. P. C. 375.

(c) In 1932 *W. E. Beckett* answered this query in the affirmative, *l.c.* at p. 364.

(d) *Cf.* Barnard, J., in *Scrini Vasan v. Scrini Vasan*, [1946] P. 67, 69-70.

(e) [1946] P. 67.

(f) To the same effect, see *Re Millard* (1887), 1 L. R. 10 Madras 218.

gamous marriage was emphatically rejected. On almost identical facts, the learned Judge followed his decision in *Baindall v. Baindall* and was confirmed by the Court of Appeal (g). The grounds of the judgment delivered by Lord Greene, M.R. (h), are worthy of attention as an indication of an entirely novel approach to this perplexing subject. Instead of venturing into an examination of the extent to which polygamous marriages are as such recognised in this country, the Master of the Rolls preferred to hold that the respondent had acquired the status of a "married man" by the law of his domicile and that this status was entitled to full recognition in England. This expedient argument, though undoubtedly covering the present case, is open to some objection. Status acquired by virtue of some foreign system of law is not invariably recognised in England for all purposes. For example, the plea of infancy (by virtue of the law of domicile) of a contractor is no defence to an action on a commercial contract concluded in this country, if by the internal law of England the *de cuius* was of full age (i). Here, a foreign status must yield to the exigencies of commercial relations. Similarly, in connection with "marriage contracts", the status predicated by the law of the domicile is frequently rejected by English Courts, as, e.g., the alleged incapacity of the Vasaya in *Chetti v. Chetti* (k). Furthermore, the suggested criterion would collapse in the case of a Mohammedan who, after marrying a native woman in India, acquired a domicile of choice in England. In that case, the Court would be squarely faced with the problem: Does English law recognise the validity of polygamous unions? and could not take shelter behind a specious reference to the law of the domicile, since the latter would *ex necessitate* be English. Lord Greene, M.R., indeed, attempted to answer this impasse by expressing the opinion that the status of marriage once acquired could not be lost save by dissolution or death of the spouses (l). This may be in accordance with the generally accepted principle that a decree of nullity cannot be obtained on the ground of incapacity by virtue of a subsequent domicile of choice, if the *de cuius* was capable by the law of the domicile at the time of marriage; but it is doubtful whether any useful purpose is served by the introduction of juridical complications which would have been avoided by an unequivocal declaration in favour of polygamous marriages. It should not be forgotten that Stirling, J.'s ratio in *Re Bethell* proceeded on the premise that, though recognised by the law of the domicile, a polygamous union cannot be acknowledged in this country on the ground of public policy. It is this element which constitutes the issue. The decision of the Court of Appeal, however, in spite of its inconclusive reasoning, is authority for the proposition that the public policy of English law does not take objection to polygamous marriages and will give full recognition to their existence and consequences.

(g) [1946] P. 122.

(h) In which Morton and Bucknill, L.JJ., concurred.

(i) *Per* Greene, M.R., in *Baindall v. B.*, [1946] P. 122, 128; Dicey, pp. 634-7; Cheshire, 215-8.

(k) [1909] P. 67. Cf. *Ogden v. Ogden*, [1908] P. 46 (C. A.).

(l) At p. 127.

V

Greene, M.R., in *Baindall v. Baindall* (m) expressly left undecided whether, for purposes of bigamy, a polygamous marriage would render one or the other spouse a "married person". Some learned authority is to be found for the statement that, in these circumstances, such a union would produce no primary consequences at all, with the inevitable result that one of the parties would be free to remarry in this country without incurring the risk of a prosecution for bigamy, although such second marriage is apparently void in the Divorce Division of the High Court. As long ago as 1880 Lush, L.J., in *Harvey v. Farnie* (n) commented that "if one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she would not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country". This dictum, based on an erroneous interpretation of *Hyde v. Hyde*, formed the basis of the judgment of Avory, J., in *R. v. Naguib* (o). There an Egyptian of Mohammedan faith had married (1) an Egyptian woman in Egypt in 1898, (2) an Englishwoman B in England in 1903 while his original marriage was still subsisting, and (3) another Englishwoman C at Salford in 1914. He was prosecuted for bigamy with respect to his third "marriage", his defence being that, after his second but before his third marriage his first wife had died and that consequently, the second marriage being null and void, he was not guilty of bigamy in marrying the third time. Avory, J., rejected this contention on the ground that, the first marriage being polygamous, the prisoner validly married B as his first wife and therefore committed the offence charged by marrying C while his previous marriage was still subsisting. The Court of Criminal Appeal upheld this judgment, though on the alternative ground suggested by Avory, J., that the prisoner had failed to prove his Egyptian marriage. Viscount Reading, C.J., refused to commit himself on the point under discussion. In *R. v. Registrar for Hammersmith, ex p. Mir-Anwaruddin* (p), Darling, J., expressed his evident approval of the dictum by Lush, L.J., and it must be confessed that there is some cogent judicial authority for this rule.

At the same time, it cannot escape attention that these various pronouncements proceeded on the now-exploded assumption that polygamous marriages were totally void in English law, and there is still some hope that a juridically consistent attitude will ultimately be adopted. The proposition that a "marriage" is good for one purpose and not another is apt to leave the layman at sea in circumstances in which ignorance of law will prove of no avail. Such a conclusion, though frequently encountered in American law, should be avoided at all costs. Moreover, it may be legitimate to doubt the practical convenience of the alleged principle. To sanction such subsequent marriages is a direct incentive to polygamy which the law of bigamy is designed to combat.

On the other hand, the difficulty inherent in the view suggested here is that the felony of bigamy is committed whether the alleged

(m) At p. 130.

(n) (1880), 6 P. D. 35, 53.

(o) [1917] 1 K. B. 359.

(p) [1917] 1 K. B. 634.

second marriage took place in this country or abroad. In the absence of a saving provision, a Mohammedan British subject (*q*) who chooses to avail himself of his right to take a second spouse, would be liable to prosecution on setting foot on English soil (*r*). Once again the attempt to invest a criminal statute with extra-territorial operation may prove an obstacle to the rationalisation of the law. It is necessary, therefore, that the ultimate determination of this question may have to proceed on the basis of utilitarian considerations which are not correlated to the position of private law.

Among other primary consequences of a polygamous marriage, we must take cognizance of the legal position of the "wife". Thus, *e.g.*, by section 10 of the British Nationality and Status of Aliens Act, 1914, the alien "wife" of a British subject acquires her husband's nationality. Under the Workmen's Compensation Acts, the "wife" of the victim of an industrial accident is entitled to compensation (*s*). Again, for purposes of succession, conveyancing, etc., the status of either spouse requires consideration. In all these cases, it is confidently submitted, the Courts would have little hesitation to predicate the status of legality to the parties of a polygamous marriage. The test laid down by the Court of Appeal in *Baindall v. Baindall* is whether the particular spouse is a "married person" by the law of his or her domicile, or more accurately by the *lex domicilii* at the time of marriage. If this test can be satisfied, English Courts will grant full recognition to that status, irrespective of whether this is the result of a polygamous or monogamous union. It is unlikely that the rationale of the South African decision in *Seedat's Case* would be followed in this country. Innes, C.J., in the Appellate Division in an exhaustive judgment refused to accord recognition to the first "wife" as the "surviving spouse" of a Mohammedan who had married her in India whilst domiciled in that country (*t*), but held the offspring to be "legitimate children" so as to come within the exemptions of the Act. "With regard to the wife, the issue is the validity of the marriage to which she is a party; with regard to the children, the issue is their right to the status of legitimacy. The wife's position cannot be considered apart from the marriage, but the position of the children may be. True, their legitimacy follows according to the law of their domicile from the validity of their mother's marriage. But we are asked to recognise the *conclusion*, not the *ground* on which it is based" (*u*). As we have already observed, the status test adopted in this decision to determine the legitimacy of the children has now been extended by the Court of Appeal to the status of the spouses. The Court will in either case have regard to the conclusion of the *lex domicilii*, not the ground on which it is based (*a*).

(*q*) *R. v. Earl Russell*, [1901] A. C. 446.

(*r*) Moreover, the possibility of marriages at the Mosque in Woking may require special consideration.

(*s*) Such a claim was admitted by the Supreme Court of Iowa in *Royal v. Cudahy Packing Co.*, 195 Iowa 759.

(*t*) Following *Esop v. Union Government* (1913), 13 C. P. R. 133, *R. v. Sakina*, [1912] T. P. D. 1079, involving the meaning of "wife" within an immigration statute, *Nalana v. R.*, [1907] T. P. 407; *R. v. Mboko*, [1910] T. P. 445, concerning the rule that a wife is not competent to give evidence against her husband.

(*u*) *Per Innes, C.J.*, [1917] A. D. 302, 312. See also at p. 309.

(*a*) Cf. also *Royal v. Cudahy Packing Co.*, *Kapigian v. Der Minassian*, 212 Mass. 412, and *Yew v. Att.-Gen.*, [1924] 1 D. L. R. 1166.

VI

Among the secondary consequences of marriage, the most crucial is the issue of legitimacy of the children. In *Re Bethell*, Stirling, J., held that the daughter of a domiciled Englishman, the offspring of a polygamous union, was incapable of succeeding to an interest under an English settlement. The learned Judge felt himself bound by the decision in *Hyde v. Hyde*, apparently overlooking the fact that Lord Penzance had been careful in guarding himself from laying down any general principle beyond the rule that divorce could not be granted in the circumstances. The issue of legitimacy presents special problems, since its determination may be altogether independent from the validity of the parents' marriage. It is a matter of status and *prima facie* determinable by the law of domicile of origin of the child (b). If, therefore, the offspring of a polygamous marriage is domiciled at birth in a country in which such unions are recognised, it should be legitimate all over the world (c). The separation of these two issues provided, as already referred to, the basis of the decision in *Seedat's Case* where, for purposes of succession duty, the four children of the Mohammedan domiciled in India were recognised as legitimate on the ground that that was their status by Indian law, irrespective of the invalidity of their parents' marriage and the decision that their mother was not their father's "surviving spouse". Chitty, J., in *Re Ullee* (d) expressed a similar opinion. This approach, however, is defective for two reasons :—

- (a) It would necessitate the illegitimacy of children born after their father's change of domicile to a monogamous country, since in these circumstances the validity of the marriage itself would become the "preliminary question".
- (b) It is not clear whether the two issues can be thus separated in view of the much-criticised decision of the House of Lords in *Shaw v. Gould* (e), in which it was laid down, though with some hesitation at any rate on the part of Lord Colonsay, that children born of a marriage invalid by English law cannot take under an English will although they were legitimate at their domicile of birth.

Fortunately, all speculations on this point were set at rest by the House of Lords in *Lord Sinha's Peerage Claim*, in which the Committee of Privileges upheld the claim to a barony by the eldest son of a Hindu married in India in accordance with Hindu religion. Lord Maugham, L.C., delivering the principal judgment (f), cut the Gordian knot by granting full recognition to the legitimacy of the claimant: "It cannot be doubted now, notwithstanding some earlier dicta by eminent Judges, that a Hindu marriage between persons domiciled in India is recognised in our Courts, that issue are regarded

(b) *Re Andros* (1883), 24 Ch. D. 637.

(c) Foote, p. 93; Bahr, para. 36; Cheshire, pp. 380 ff.

(d) (1885), 53 L. T. 711.

(e) (1868), L. R. 3 H. L. 55.

(f) In which all members of the Committee concurred, but Lord Thankerton with extreme reluctance.

as legitimate and that such issue can succeed to property, with the possible exception to which I shall refer later" (g).

The exception noted by Lord Maugham is worthy of consideration. Although it is now a firmly established principle that legitimacy by the *lex domicilii* (irrespective of the test of English internal law) entitles to succession to personal (h) or real (i) estate in England under a will, or under the Statutes of Distribution (k), the "heir" to English land must come within the "narrowest pale of English legitimacy" (l). This principle, however, known as the rule in *Birtwhistle v. Vardill* (m), is confined to succession to English "hereditaments" (n) on intestacy, and according to the better opinion does not apply to leaseholds (o). In view of the sweeping changes of the A. E. A. 1925 (p), it is not probable that this rule will find an application outside the few remaining circumstances in which land will still pass to the "heir" in accordance with the law prevailing prior to 1926 (q).

VII

A peculiar aspect of most of the English cases is that the marriages in question were not usually *de facto* polygamous in the sense that the husband had actually a plurality of wives. A marriage is none the less polygamous in law, though monogamous in fact (r). It is debatable whether the partial recognition accorded to such marriages in recent decisions would have been affected by this additional element. Lord Maugham in the *Sinha Case* expressly confined his judgment to *de facto* monogamous marriages and doubted whether other considerations would not have to be taken into account in dealing with an actual plurality of wives, but this observation was apparently restricted to descent of dignities. In the much-quoted South African case the Mohammedan, domiciled in India, married his first wife in that country,

(g) Report of the Committee, p. 2, quoted by Greene, M.R., in *Baindall v. Baindall*, [1946] P. 122, 128. Lord Maugham completely ignored *Re Bethell*, which must now be considered overruled, except for the small platform on which it may still be distinguished, viz., the husband's domicile at the time of marriage.

(h) *Andros v. Andros* (1883), 24 Ch. D. 637.

(i) *Re Grey's T.*, [1892] 3 Ch. 88.

(k) *Re Goodman's T.* (1881), 17 Ch. D. 266.

(l) *Per James, L.J.*, in *Re Goodman's T.*, at p. 299.

(m) (1840), 7 Cl. & F. 940. The rationale of this decision is commonly explained on the ground that capacity to take immovables is determined by the *lex rei sitae* (cf. Cheshire p. 540). But that rule does not explain which system of law the *lex situs* should select to determine legitimacy, and it certainly does not imply the automatic application of the internal law of the situs. Is the English domestic law rule designed to determine legitimacy of persons domiciled in England or the legitimacy of all persons claiming an interest in English land? (see Cook, Logical and Legal Bases, chap. 10). In cases of succession to land under a will, the Court will decide legitimacy by reference to the *lex domicilii*—*Re Grey's T.* We are, therefore, driven to the illogical conclusion that in the case of succession under a will, the English rule applies only to claimants domiciled within the jurisdiction, but in the case of intestacy to every claimant irrespective of domicile.

(n) Under the Statute of Merton, 1235.

(o) See the excellent discussion in Foote, 273-6.

(p) In particular s. 45 (1).

(q) Ss. 131, 132, L. P. A., 1925. See Maugham, L.C., at p. 3 of the Report. It should be noted, however, that the Lord Chancellor was not absolutely certain whether the rule was applicable to children born of polygamous marriages.

(r) This was apparently not Lord Brougham's view in *Warrender v. Warrender*: "We clearly never would recognise the plurality of wives and consequent invalidity of second marriages, standing the first, which second marriages the laws of these countries authorise and validate" (2 Cl. & F. 488, 532).

then moved to Natal, and after the acquisition of a domicile of choice married a second wife whilst on a temporary visit to his home country. While recognising the offspring of the first marriage born with an Indian domicile, the Court refused to extend similar rights to the children of the second union. This decision is no authority for the view that, had the husband retained his domicile of origin at the time of his second marriage (s), the children born by the second "wife" would have been considered illegitimate.

The only English decision which has any direct bearing on this matter is *Re Belshah* (t). In an administration action, it appeared that the intestate, a Mohammedan domiciled in Iraq, had left two wives, both of whom he had married in England in accordance with Mohammedan rites, and children by both spouses. Claims were advanced by both parties to the exclusion of each other. After a prolonged hearing an agreement was reached, which received the sanction of the Court, whereby the validity of both marriages was recognised, with the result that the two wives and their respective children succeeded equally to the estate. Although not carrying conclusive authority, this decision would indicate that Lord Merrivale, P., was far from considering the marriages as complete nullities, since alternatively the Crown would have been entitled to claim the estate as *bona vacantia* (u).

This conclusion is not as astounding as it may appear at first thought. Having once overcome the traditional prejudice of regarding polygamous marriages as mere illicit cohabitation, the concurrent existence of two or more marriages is little different from consecutive marriages (a), in which latter circumstances it has never been seriously contended that the children of either or both are disentitled to succeed to their father's estate (b). The Privy Council has never shied from recognising the status of such second wives (c) and also allowed their children to take in equal shares with the issue by the first wife (d). There is no reason to believe that the Courts would in these circumstances depart from the principles discussed above (e).

(s) And at the date of the children's births, according to the ratio of that judgment.

(t) Times Newsp., December 16, 18, 1926; January 14, 18, 1927.

(u) Cf. *W. E. Beckett, l.c.* at p. 348.

(a) There is, however, a notable pronouncement to the contrary in *Shaw v. Gould*, where the legitimacy of a child born of a second marriage was at issue. This depended, in the view of the H. L., on the validity of that marriage which had been contracted after a divorce valid by Scottish, but invalid by English law. Lord Cranworth, in adducing practical reasons against the legitimacy of the child, pointed out that "it cannot be argued that the issue of both unions should share together": (1868), L. R. 3 H. L. 55, 71.

(b) The preponderance of opinion in the U. S. points to this conclusion. In *Williams v. Oates*, 27 N. Ca. R. 375, Ruffin, C.J., remarked *obiter* that if a Turk with two wives were to come to the U. S., we would not refuse to administer to them the justice due the relation contracted by them. See also *Polydore v. Prince*, 1 Ware 402.

(c) *Cheang Tye Phin v. Tan Ah Loy*, [1920] A. C. 369.

(d) *Khoo Hooi Leong v. Khoo Hean Kwee*, [1926] A. C. 529.

(e) American authorities are scanty on this point. Goodrich entertains some doubts whether the recognised rule of acknowledging potentially polygamous marriages can be extended to an actual plurality of wives, and expresses the view that the relationship would probably be recognised, though not some of its incidents. Thus he favours the legitimacy of children, but doubts whether several wives could claim under Workmen's Compensation Acts. However, in *Yew v. Att.-Gen.*, [1924] 1 D. L. R. 1166, a British Columbia Court upheld the claim for exemption from legacy duty by the second wife of a Chinese.

NOTES OF RECENT CASES.

1. LAW OF PROPERTY AND CONVEYANCING.

Straying animals—cattle trespass—onto other land—onto highway.—No doubt difficulties of labour and materials may give rise to problems of cattle and animals straying. It so happens that two cases, one in the Court of Appeal and the other in the House of Lords, give very clear guidance on the law. In *Sutcliffe v. Holmes*, [1946] 2 A. E. R. 599, the defendant's sheep strayed from common land, through land belonging to the M. corporation in which the walls were broken down, onto the plaintiff's land. The Court of Appeal held, as a matter of construction, that the plaintiff was under no duty to fence his land as against the commoner's rights, notwithstanding that it had been enclosed under an enclosure award. The Court held that it was immaterial, whether or not the M. corporation was under any duty to fence, because the wrongful act of a third party did not constitute a defence, *provided that* the defendant knew of the fact that the fences were down. Therefore, the defendants were liable, under their common law duty, to keep safely cattle that were pastured on the common, and liability did not depend upon negligence.

In *Searle v. Wallbank*, [1947] 1 A. E. R. 12, the plaintiff was riding with a masked headlight in accordance with the blackout regulations and collided in a lane, a public highway, with the defendant's horse suffering a serious accident thereby. The House of Lords accepted a finding that the horse was on the highway through a defective hedge on the defendant's land. The case went on appeal to the House of Lords because of the desire of the Court of Appeal that the law should be clarified. Three speeches, those of Lord Maugham, Lord Porter and Lord du Parq, dealt exhaustively with the subject and will become the *locus classicus* for any further reference. It was clearly laid down that (i) no liability can exist for damage done on the highway to highway users apart from negligence; (ii) no duty to fence the highway exists; (iii) no duty of care to prevent animals straying onto the highway from land inadequately fenced exists.

The judgments proceed on a clear recognition of the fact that there is a liability in trespass to land (but not necessarily to person), that is liability without negligence, for straying animals. There is no liability for injury on the highway without negligence.

Emergency legislation—mortgage—sale by mortgagors—bankrupt mortgagor—tenant at will—no right to object.—In *Jarrett v. Barclays Bank*, [1947] 1 A. E. R. 72, a deceased bankrupt had prior to bankruptcy mortgaged her property, her husband joining to secure her banking account, the bank being the mortgagees. The husband was executor of the deceased bankrupt, and the property was sold under an order under the Courts (E. P.) Act, 1943, on a summons to which the husband was not a party. The husband complained that (a) he should have been a party to the summons, and (b) the sale was at an under value. The Court of Appeal held that no such action would lie because the husband had no *locus standi*, since, as representative of the deceased bankrupt, he had no present interest in the property, and as tenant at will, he had no interest in the sale of the freehold or the proceeds of sale.

In effect this reasoning applied to both branches of the claim, though the judgment of Morton, L.J., examines in some detail the provisions of

the Act and rules governing the right to be a party to a summons for leave to realise a security. The decision seems to turn on the precise wording of rule 20 (1) (iv), which provides for the respondent to the application where the mortgagor is bankrupt being the trustee in bankruptcy.

The case is interesting on two points. It seems to dispose of a point, met by the writer in practice, that a purchaser need not be satisfied that the proper respondent to a summons under the Courts (E. P.) Act was joined. The purchaser was joined in the proceedings in the case noted and might have incurred heavy expense, not to say inconvenience. Where, therefore, the abstract does not show the respondents or it does not include all possible persons interested, a purchaser should insist upon an explanation and not be put off with references to section 204 of the Law of Property Act, 1925.

Secondly, the Court does not seem to have discussed the position of a tenant at will with regard to the equitable right to redeem. There is no question that an ordinary lessee has an equitable right to redeem: *Tarn v. Turner*, 39 Ch. D. 456, even when the lease is not binding on the mortgagor. It is, therefore, not easy to see what is the difference of the position of the tenant at will. We think it unsound to carry this case to the extent of saying that a tenant at will has no equitable right to redeem, but this may be its implication. It will be borne in mind that this equitable right to redeem can be employed to enforce a lease not binding on the mortgagee, because such a lease is normally binding on the mortgagor: see *Iron Trades Assn. v. Union Land*, [1937] Ch. 313.

It is, of course, also interesting to note that the Court of Appeal adopted the view of Wynn-Parry, J., that "the mere fact that a bankrupt has a future interest in a possible surplus does not mean that he has a present interest and there is, in my view, nothing but confirmation of this proposition in *Bird v. Philpott*", [1900] 1 Ch. 822, which had been cited in favour of the husband by counsel. In *Bird v. Philpott* (*supra*), Farwell, J. (at p. 828) said, "As I read the Bankruptcy Act the trustee takes all the bankrupt's property for an absolute estate in law but for limited purposes, namely, for the payment of creditors in the bankruptcy, and that bankruptcy only. . . . Subject to that he is a trustee for the bankrupt of the surplus. He, as a trustee, is in a better position than an ordinary trustee . . . that is to say, the bankrupt has not the ordinary right of the *cestui que trust* to intervene until the surplus has been ascertained . . . he has a right to the surplus—a right which he can dispose of by will, or deed, or otherwise—although such disposition will, of course, be ineffectual unless in the event there prove to be a surplus upon which it can operate".

It seems to the writer that there is some confusion of language in these judgments. It is submitted, with respect, that the right of the bankrupt is not a mere "*spes successionis*" or bare expectancy. If it is not, it is doubted whether, indeed, it can properly be called a future interest at all. It is not contingent any more than a residuary gift in a will is contingent because there may not be assets sufficient to meet specific and pecuniary legacies. It is not an interest in any particular property at all and this may be the justification of this decision, but we feel that more will be heard of this problem.

Nuisance—subsidence and right of subjacent support—gas pipes.—The decision in *Newcastle under Lyme v. Wolstanton, Ltd.* (*ante*, p. 113), has been reversed on appeal: [1947] 1 A. E. R. 218. The reason for this reversal is important but can be shortly stated in the words of Morton, L.J., at p. 224: "We agree (a) that the corporation has no right of ownership

or proprietorship of the soil in which its pipes are laid; (b) that it is not the tenant of any part of that soil; (c) that no easement is vested in the corporation; (d) that the corporation has no title, legal or equitable, in that soil; (e) that the corporation is not the inheritor of the right of support admittedly vested in the owners of the surface land. Further, in my view . . . the corporation has not the exclusive right to occupy any portion of that soil as distinct from the space or cavity occupied by the pipes". This implies, as it seems to us, that though gas pipes are buried in realty under a statutory power they do not form part of the realty, and to that extent that stratum in the realty is destroyed. The decisions in rating cases do not affect this decision and were expressly distinguished. But we think that more may be heard of this peculiar property interest that amounts to an "occupation" restricted to gas mains: see *per* Somervell, L.J., at p. 229. It corresponds with a statutory licence for user of the surface, but we think that a licence to use as distinct from a licence to take away subsoil obviously involves some peculiarities.

Contract for sale—agricultural tenancy—emergency legislation and notice to quit.—The short point in *Lloyds Bank, Ltd. v. Elliott*, [1947] 1 A. E. R. 79, was that a notice to quit an agricultural tenancy was given in March, 1945, and contracts for sale were entered into in September and December of the same year. Macnaghten, J., held that the result of the contracts was to render the notice to quit void under the Defence (General) Regulations, 1939, r. 62 (4A). There was nothing in the regulation to exclude notices to quit given prior to sale, nor anything to require it to be read except according to the reasonable meaning.

(1 K. & E., p. 1075.)

Public hearings—material evidence—natural justice.—*Price v. Minister of Health*, [1947] 1 A. E. R. 47, is another of what promises to be a long line of cases on what constitutes "natural justice" in determining a matter for which a public inquiry must be held before confirmation of an order by a Minister. Here the Minister had before him two letters from the public authority which stated that the local authority wished to proceed as soon as possible, and that the land would enable development immediately conditions permitted. These letters though before the Minister prior to the public inquiry were not put in evidence. Morris, J., after considering *Errington v. Minister of Health*, [1935] 1 K. B. 249; *Offer v. Minister of Health*, [1936] 1 K. B. 40; *Stafford v. Minister of Health*, [1946] K. B. 621; *Miller v. Minister of Health*, [1946] K. B. 626, held that there was no ground for quashing the order. The Minister was entitled to have knowledge administratively that comes to him without being put in evidence in the inquiry.

A somewhat similar point was taken about non-disclosure of evidence in *Summers v. Minister of Health*, [1947] 1 A. E. R. 184. Here also Morris, J., decided in favour of the Minister. He also refused to accept an argument based on the fact that the objectors to the order had not been asked to elaborate their objections.

It is, perhaps, this complete laxity in the matter of evidence, combined with no legal principles of decision that constitute the peculiarity of the administrative tribunal. What that tribunal is required to do, and how it is required to do it, is one of the future problems of this country. It is thought that in all probability much will be heard of the proposition in the next few years.

Dangerous premises—liability of landlord to lodger—defective geyser.—In a careful judgment Lewis, J., has made it plain that the landlord does not owe a duty of care to a licensee of a tenant, and that the principle in *Donoghue v. Stevenson*, [1932] A. C. 532, does not apply: *Travers v. Gloucester Corpn.*, [1946] 2 A. E. R. 506. The landlord had let premises with a defective geyser in the bathroom which resulted in the death of the plaintiff's son. Lewis, J., held that, assuming negligence to be proved, no action would lie because no duty of care was owed by the landlord to the licensee, apparently for two reasons. First, the defect could be discovered by inspection, but secondly, and more importantly, because there is no duty of care to occupiers of dangerous premises. It must be borne in mind that the position is different where the person is not in the position of landlord or the plaintiff is not an occupier of the premises. In *Haseldine v. Daw*, [1941] 2 K. B. 343, a visitor to a block of flats was injured by a defective lift which remained in the control of the landlord. It was held, by the Court of Appeal, that the landlord was liable as to a licensee (or invitee—there was a doubt which) namely, to warn of all defects of which he knew (or ought reasonably to have known). The repairer of the lift, employed by the landlord, was liable under the rule in *Donoghue v. Stevenson* (*supra*). The only real distinction between the case here noted and *Haseldine v. Daw* (*supra*), is that the lodger is a licensee in occupation and a visitor is a licensee not in occupation. The landlord had been held not liable for an escape of gas in *Davis v. Foots*, [1940] 1 K. B. 116.

Dangerous premises—recreation ground—liability to child licensee.—A child's finger was injured while playing with a swing in a public playground provided by the local authority. It was found as facts that: (1) the child's finger was injured by the swing; (2) the swing was dangerous and defective; (3) the defendants did not know this; (4) the defect could easily have been remedied; and (5) there was no contributory negligence on the part of the child. On appeal the Court of Appeal held that (i) the child was a licensee on the premises; and (ii) the defendants were not liable because their only duty was to warn of defects of which they had knowledge: *Sutton v. Bootle Corpn.*, [1947] 1 A. E. R. 92.

The importance of this case lies in the judgment of Asquith, L.J., in which Scott, L.J., and Vaisey, J., concurred, on the point that there is no intermediate class between licensee and invitee, where dangerous premises are concerned, arising from the fact that the person injured is a child. The duty of care involved is sometimes described as negligence, but in fact, it does not depend upon the ordinary obligation in negligence. It is not the duty of care of an ordinary reasonable and prudent man, a question of fact for the jury on the circumstances of each case, but a specific duty laid down by law, namely, in the case of a licensee to warn of hidden dangers of which the defendant was aware.

The learned Lord Justice did, however, point out (at p. 97) that where children were involved there might be a rather heavier factual obligation, if the "trap" constituted an "allurement". What might be patently dangerous to an adult might constitute a danger to the unsuspecting child. On the other hand it must apparently be known to be dangerous. We think that more may be heard of this point. "Allurement", as used in the passage in Clerk and Lindsell's *Torts*, 10th ed., p. 545, which Asquith, L.J., criticised, was concerned, as it would seem, in a more restricted sense. Here the learned editor was suggesting that where an allurement existed a child, but not an adult, might be a licensee

when meddling where he should not. It raises the child from the status of trespasser to licensee. In this connection the case of *Purkis v. Walthamstow B. C.* (1934), 151 L. T. 30, did hold that swings in a public recreation ground did not constitute such an allurement to young children as to require supervision in the same way as the wire rope in *Excelsior Wire Rope Co. v. Callan*, [1930] A. C. 404, and the poisonous berries in the park in *Glasgow Corp'n. v. Taylor*, [1922] 1 A. C. 44. In the two last cases no question was ever raised but that the defendants knew of the danger to children. If the question of "allurement" adds liability to warn in the case of child licensees where no warning is necessary to adults, some difficulties concerning proof of knowledge of danger may arise.

*Profit—creation by reservation or exception—licence and profit.—**Re Vicker's Lease*, [1947] 1 A. E. R. 195, is an interesting case on real property and construction. The owner of premises granted a lease for twenty-one years of "the exclusive right privilege and liberty of shooting . . . over the land coloured pink and fishing in the river Test . . ." The lease contained the following clause, "It is hereby understood and agreed that the owner shall retain for her own use a rod in the said fishing, but not on either bank between. . . ." Roxburgh, J., held that this clause constituted "a beneficial interest in a rod in the said fishing during the term of the lease which was capable of devolving on her personal representatives". In the report no authorities are referred to, but it is submitted that this decision can scarcely do other than constitute a profit in the lessor's rod. It should, however, be pointed out that this is not how the judgment is framed and in one sense it is difficult to construe. If the reservation of a "rod" constituted a profit then the profit was held in common with the lessee's profit which was clearly expressed to be "exclusive". If this reservation did not constitute a profit then it was a licence the benefit of which could be assigned. The lease contained no reference to successors in title, and if a licence only was created the question might then arise whether or not an assignee from the lessee could be bound.

It should be pointed out that an exclusive right of fishing granted by deed may constitute a profit: *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; and so may a mere agreement for a tenancy of sporting rights: *Lowe v. Adams*, [1901] 2 Ch. 598. No special words are necessary to grant a profit which is *prima facie* non-exclusive: see *Carr v. Benson* (1868), L. R. 3 Ch., at p. 532. It is, therefore, necessary to exercise some care in drafting this form of agreement to be sure of determining whether or not a profit or licence is to be created.

(1 K. & E., p. 1081.)

*Covenant in restraint of trade—doctor's assistant—area—practice.—**Routh v. Jones*, [1947] 1 A. E. R. 179, may be referred to briefly. It arose out of a covenant in a deed of employment as doctor's assistant that the assistant should not, for a period of five years after the termination of employment, engage in practice as principal or assistant, nor fill any professional appointment within a ten mile radius. Evershed, J., held that the width of the covenant was unreasonable to protect the practice of a country general practitioner, and was not severable. The period and radius did not in the circumstances seem unreasonable, but

as the covenant was unreasonable in width in covering all professional appointments and could not be severed, it failed altogether.

These decisions on covenants in restraint of trade always depend on the evidence of reasonableness and the test is whether they are reasonably necessary for the protection of the business of the covenantee. The burden of proof of reasonableness falls upon the covenantee and the covenant will usually be construed against him. A covenant can only be severed if it in fact constitutes two or more covenants. These covenants are not easy to draw and solicitors will usually find that the covenantee is apt to exaggerate the protection necessary to him. It is peculiarly dangerous to insert wide words for fear lest some item of protection is forgotten. It is usually better to risk some interference than to render void a legitimate protection. If there is doubt then the covenant can be taken in several parts so that some at least may stand. Actually when so split up the unreasonableness of some part may become apparent to the draftsman.

(1 K. & E., p. 42.)

Power in the nature of a trust—persons entitled in default of appointment—tenancy in common.—In *Re Arnold's Trusts*, [1946] 2 A. E. R. 579, a declaration of trust was made in favour of A for life and after her death "in trust for the children of A or any of her issue in such shares (if more than one), and in such manner as she shall by deed or deeds or her will appoint. . . ." It was accepted that there was no gift over in default of appointment and that after the death of A the class was closed. Wynn-Parry, J., held that only those persons who could take under an appointment, if made, could constitute the class, and that they took as tenants in common.

The learned Judge based his conclusion on the first point upon his construction of the document following the principles of *Lambert v. Thwaites*, L. R. 2 Eq., at p. 155. If there is a gift over in favour of the class all available members of the class take, but if there is no gift over then only those can take who could take under an exercise of the power. The word "any" clearly, in the opinion of the learned Judge, indicated that only a power was given to A. He then went on to point out that as the power was exercisable by deed or will this enlarged the possible class, because persons might be able to take by deed who could not have taken by will, e.g., owing to their death in the lifetime of the donee. He, therefore, held that all the children and issue of A born in her lifetime, whether or not they survived her, took in default of appointment.

With regard to the question of taking as tenants in common the learned Judge adopted a passage in *Hawkins on Wills*, 3rd ed., p. 75, which concludes: "In fact any power which enables the donee either to select objects or to fix proportions, seems to contain that reference to plurality of interest among the objects which is sufficient to create a tenancy in common". It will be observed, therefore, that an implied gift over will be in common unless there is something unusual in the power of appointment.

It may be convenient here to note one other point. These implied gifts over in default of appointment are commonly spoken of as "a power in the nature of a trust". This contradictory expression (since a power is discretionary, a trust imperative) is hallowed by tradition but is apt to mislead. There is no trust about the power itself which is, and can be, exercised according to the ordinary rules. The point is that

owing to the power and the non-existence of a gift over the Court will in some circumstances *imply* a gift in default of appointment in favour of the objects of the power, *i.e.*, the persons who could take under the power. This is a form of implied gift or trust and, therefore, the implication can be rebutted by evidence of contrary intention. There is really no great peculiarity about it—the existence of the power may or may not, upon construction, imply an intention to create a trust. It is, therefore, essentially a matter of construction, as was pointed out by Tomlin, J., in *Re Coombe*, [1925] 1 Ch. 210, followed in the instant case.

2. WILL CASES.

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn,
Barrister-at-Law.

Effect of void condition precedent.—The case of *Re Piper*, 62 T. L. R. 618, is one more illustration of the chaos of our law of testamentary conditions. The precise point to be decided was whether a gift upon a void condition takes effect absolutely, free from the condition, or whether both the condition and the gift are void. According to the authorities, the answer depends on whether the gift is one of realty or personalty and on whether the condition is precedent or subsequent. A condition precedent is one in which the gift is not intended to take effect until the condition happens—*e.g.*, a gift to X if she marries. A condition subsequent is one in which the gift vests at once, but becomes divested if the condition happens—*e.g.*, a gift to X if she does not remarry.

The rules governing the effect of void conditions annexed to gifts of real estate are derived from the common law and are simple and clear. If the condition is precedent, the devise is void; if the condition is subsequent, the devise is absolute.

The rules governing the effect of void conditions annexed to gifts of personal estate are derived from the civil law and are complicated. No two authors state them alike. Jarman (pp. 1443–1444) says that if a condition precedent is originally impossible, or is illegal as involving *malum prohibitum*, the bequest is absolute, and the same rule applies to all conditions subsequent; but if the condition precedent was possible in its creation, but subsequently becomes impossible, or if it is illegal as involving *malum in se*, both the condition and the gift are void. The distinction between *malum prohibitum* and *malum in se* is found in Sheppard's *Touchstone*, but not in any modern author. No modern case turns on this distinction, nor was it known to the Roman law, which simply made illegal or immoral conditions void, leaving the gift valid.

In *Re Piper* (*supra*) the testator gave part of a trust fund in trust for such of four named children as attained the age of thirty years and did not before attaining such age reside with their father, with a gift over if no child attained a vested interest. The father and mother of the children had been divorced before the date of the will. The testator defined very precisely what he meant by "reside", obviously with an eye on cases like *Sifton v. Sifton*, [1938] A. C. 656, so as to prevent an argument that the condition was void for uncertainty.

(1) Romer, J., first held that the condition was precedent and not subsequent. No general test is deducible from the cases for determining whether a condition is precedent or subsequent; the question depends on the language of the particular will. In this case the condition was held to be precedent because of its close association with the requirement that

the children must attain the age of thirty before attaining a vested interest.

(2) The learned Judge next held that the condition was void because it was calculated to bring about the separation of parent and child. The well-known decision of Parker, J., in *Re Sandbrook*, [1912] 2 Ch. 471, is, of course, ample authority for that proposition. Parker, J.'s, reason for holding the condition void in that case was that it was contrary to the policy of the law.

(3) Romer, J., finally held that the cause of invalidity was *malum prohibitum* and not *malum in se*, and therefore the gift took effect freed and discharged from the condition. He refused to hold in the absence of direct authority that a gift the object of which is to keep a child away from its parent is *malum in se*. But the example in Sheppard's *Touchstone of malum in se* is murder, of *malum prohibitum* is an act prohibited by statute; and the reason why conditions which tend to separate parents and children are void is surely that they are contrary to the policy of the law, not because they are prohibited by statute. It is submitted, therefore, that the learned Judge's decision on the third point is at variance with his decision on the second. An even greater mystery is why a modern Judge should base his decision on such an archaic and barren distinction. As he himself admitted, "the difference between *malum prohibitum* and *malum in se* has never been very precisely defined or considered". It is high time that our law of testamentary conditions was rationalised and these absurd distinctions forgotten.

(Theobald 512, 518.)

Meaning of "dependants".—It is strange that there appears to be no previous authority on the meaning of the word "dependants" in a will. In *Re Ball*, 63 T. L. R. 94, the testator gave property to his son Charles or his dependants equally. Roxburgh, J., held that the word "dependants" was too vague to be given a meaning, with the result that Charles took absolutely.

(Theobald 291.)

3. FAMILY LAW CASES.

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn,
Barrister-at-Law.

Divorce—insanity—Matrimonial Causes Act, 1937, ss. 2 (d) and 3 (a) and (b)—*Crutchfield v. Crutchfield* (1946), 62 T. L. R. 661, 2 A. E. R. 730; *Whitley v. Whitley*, [1946] 2 A. E. R. 726.—The Matrimonial Causes Act, 1937, s. 2 (d), allows the presentation of a petition for divorce if the respondent is "incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition". In each of these cases a petition for divorce was filed on the ground that the respondent wife, as was established as a fact, was of incurably unsound mind and had been under care and treatment for over five years immediately preceding the presentation of the petition. In each case the petition was dismissed. In *Crutchfield's Case* a relieving officer, by virtue of his powers under the Lunacy Act, 1890, s. 20, removed the respondent to a mental hospital. Two days later the respondent's

husband took her away and placed her as a voluntary patient in another mental institution, where she remained. In *Whitley's Case* the petitioner had applied for the admission of his wife as a temporary patient, and later as a voluntary patient, to a mental hospital, where she remained for over five years.

Both petitions failed because the care and treatment which the respondents had respectively received were not such as to comply with the definition contained in section 3 of the Act of 1937, which specifically requires care and treatment for the full period, either (a) "in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930" (or under other Acts not relevant to the case); or (b) while receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, provided that such treatment follows without any interval a period of detention under section 3 (a). Barnard, J., gave a strict and reasonable interpretation to this section in *Whitley's Case*, in holding that the period which the wife spent as a voluntary patient did not follow a period of detention as defined by section 3 (a) of the Matrimonial Causes Act, 1937, since a husband's application for admission of his wife to an asylum as a temporary patient did not constitute "any order or inquisition".

In *Crutchfield's Case* Jones, J., held that the action of the relieving officer in removing the respondent to hospital did not amount to an order under the Lunacy Act, 1890, s. 20, but that the superintendent of the hospital in receiving the patient was merely acting under a duty imposed by section 20 of the Act. In both cases, accordingly, the husband could not add to the period of initial detention the long years of voluntary treatment which followed.

"In considering this matter", remarked Barnard, J., "it is not unimportant to consider how and why the Mental Treatment Act, 1930, came into being at all . . . until that Act was passed it was almost impossible for any person suffering from a mental disease or illness to receive care and treatment unless there was an order and certification, and the Act was passed to enable people, . . . to receive such treatment without the stigma of an order and certification". [[1946] 2 A. E. R. at p. 727.] The result of sections 2 (d) and 3 of the Matrimonial Causes Act, 1937, as correctly interpreted by these decisions, is to make the stigma of certification a necessary prerequisite to the stigma of divorce on the ground of insanity.

(Latey, Divorce, 13th ed., p. 79.)

Constructive desertion—neurotic condition of husband causing wife to leave him—Leng v. Leng, [1946] 2 A. E. R. 590.—A Divisional Court consisting of Lord Merriman, P., and Byrne, J., had to consider this appeal from a magistrate's decision refusing to discharge a separation order made in favour of the wife on the grounds of the husband's desertion.

The justices had found that the husband's irritable temper and neurosis, caused by his poor state of physical health, made it impossible for his wife to live with him, and that these circumstances, justifying her withdrawal, constituted constructive desertion on his part. It is material that the health of the wife and child was being affected by the unhappy conditions in the home.

The Divisional Court discharged the justice's order not, apparently, for its own sake, but because of the implications which it might involve. Lord Merriman, P., foresaw the possibility of the wife, after the passing

of a further two and a half years, presenting a petition for divorce on the ground of desertion if the order of the justices were upheld. "In plain English", stated the learned President, "that would mean nothing less than that by a judgment of a Court of justice neurosis was made a ground for divorce." (*Id.*, p. 591.) The strict statutory conditions for divorce on the ground of insanity were contrasted (see note of previous cases), and emphasis was laid on the obligations implicit in the marriage vow. The Court was clearly influenced by the fact that the desertion alleged was purely constructive. In many cases a petitioner may well have two or three alternative grounds for divorce which are not mutually exclusive; and it is possible that a different view may be taken in a case similar to *Leng v. Leng*, where desertion by one party is actual and not constructive.

(Latey 105.)

Desertion—husband and wife living in same house—Angel v. Angel, [1946] 2 A. E. R. 635.—The importance of this decision of the Divisional Court lies in the fact that "it raises for the first time in any appellate Court . . . the question whether or not a wife is precluded from asserting a charge of desertion by the mere fact that she and her husband were residing in the same house" (*per* Lord Merriman, P.). This appeal arose on the following facts: the wife, with her husband's consent, lived with their child in South Africa from 1939 to 1946, when she returned to live with her husband in England. The parties lived in the same house, but sexual relations were not resumed. The husband occupied a separate room, which he kept locked, and took his meals outside. The wife applied to a magistrates' Court for an order based on desertion, but that Court, after hearing only her evidence, dismissed the application on the ground that the decision in *Weatherley v. Weatherley* (1946), 174 L. T. 346 (see note in *The Conveyancer*, Vol. 11, No. 1, p. 66) bound them. In that case, it may be recalled, the parties were living together as husband and wife except that one of them had refused sexual relations, and no desertion was held to have taken place. The Divisional Court held that the magistrates were wrong in dismissing the wife's application merely on this ground, and remitted the case for rehearing. The principles to be applied were those in *Smith v. Smith*, [1940] P. 49, a case in which the husband had lived in a part of a house separate from his wife, and had refused to speak to her, a case which had never been considered by the justices on the hearing of Mrs. Angel's application. The decision of Pilcher, J., in *Wanbon v. Wanbon*, [1946] 2 A. E. R. 366, noted in *The Conveyancer*, Vol. 11, No. 2, p. 121, was not considered either by the justices or by the Divisional Court.

(Latey 95.)

Maintenance order based on desertion—condonation by resumption of cohabitation—whether subsequent persistent cruelty revives the original order—Markham v. Markham, [1946] 2 A. E. R. 737.—Difficulties have arisen from time to time on the construction of the provisions of the Summary Jurisdiction (Married Women) Act, 1895 (s. 7), the Money Payments (Justices' Procedure) Act, 1935 (s. 9) and the Criminal Justice Administration Act, 1914 (s. 30 (3)), with regard to the further evidence required to revive a maintenance order made under the Act of 1895. One such question of construction arose in this case, in which the wife

obtained a maintenance order in 1941 on the ground of desertion, resumed cohabitation with her husband shortly afterwards, and in 1946 applied to have the original order varied on the ground of her husband's persistent cruelty. The appeal by the husband against the order varying came before a Divisional Court consisting of Lord Merriman, P., and Byrne, J.

The learned President considered the effect of the statutory provisions mentioned above, and held that the requirement of "fresh evidence" to justify a variation applied only to the substantive, not to the monetary, part of the order. Though the resumption of cohabitation had had the effect of automatically discharging the original order, it was held, on the analogy of *Pratt v. Pratt* (1927), 96 L. J. P. 123, that the persistent cruelty constituted the "further evidence" requisite to revive the order founded on desertion.

(Latey 128.)

Judicial separation—subsequent decree of divorce—same co-respondent—costs of both petitions—Robinson v. Robinson and Pilborough, [1946] 2 A. E. R. 589.—The Matrimonial Causes Act, 1937, s. 1 (1), prohibiting the presentation of a petition for divorce within three years of marriage, does not prevent a petitioner from presenting a petition during that period for some relief other than divorce, even though he founds his case on grounds of divorce. In this case the parties were married in 1943, and in 1945 the husband obtained a decree of judicial separation from his wife on the ground of her adultery with the co-respondent, who was ordered to pay the costs of the proceedings. On the expiration of the statutory three years, the husband presented a further petition for divorce on the same grounds, and the decree was made. The only question at issue was whether the co-respondent should pay the costs of the second petition, in view of the order against him on the previous one.

Barnard, J., held that he should. The petition for judicial separation had been properly brought at a time when the remedy of divorce was not available to the husband, and it in no way prejudiced the petitioner in seeking fuller relief when such became possible. Furthermore, both sets of costs arose out of the co-respondent's adultery. This decision is clearly distinguishable from *Wood v. Wood and Stanger* (1868), 37 L. J. P. 25, in which the Court refused to order the co-respondent to pay the costs of two trials of the same issue, the jury having disagreed at the first trial. The principle of the co-respondent having to pay double costs would not, apparently, apply when a wife's petition for judicial separation is consolidated with the husband's cross-petition for divorce (*Forbes-Smith v. Forbes-Smith and Chadwick* (1901), 70 L. J. P. 61).

(Latey 264-266.)

Nullity of marriage—sterilisation of husband before marriage—wife's knowledge a bar to decree—J. (otherwise S.) v. J., [1946] 2 A. E. R. 760.—This decision of Jones, J., is a variation on a theme, one part of which was already familiar in the law of nullity before the Matrimonial Causes Act, 1937, s. 7 (1) (a) made wilful refusal to consummate a marriage a ground for that relief. The petitioning wife in *J. v. J.* based her petition for nullity on her husband's wilful refusal to consummate the marriage. Before the parties married the man, to the knowledge of his prospective wife, had undergone a medical operation which rendered him

permanently sterile, with the declared object of preventing the birth of children to his wife. The marriage was consummated in every sense except that children could never result from sexual intercourse between the parties. The petition was undefended.

On these facts it was held: (i) that the husband had wilfully refused to consummate the marriage in the terms of section 7 (1) (a) of the 1937 Act; but (ii) that the petitioning wife was not entitled to a decree because of her knowledge of her husband's sterility at the date of the marriage. There is adequate authority in support of the second ground of decision, based on considerations of equity and public policy. Thus, in *G. v. M.* (1885), 10 App. Cas. 171, at p. 197, Lord Watson referred to the rule of law "that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy, that he or she should be permitted to go on to challenge it with effect". Knowledge of impotence before marriage is clearly stronger evidence of acceptance of the state of affairs which sterility involves than mere acquiescence in such a state after marriage; and even such acquiescence suffices to prevent the party acquiescing from obtaining a decree (see *dicta* of du Parcq, L.J. (as he then was) in *Cowen v. Cowen*, [1945] 2 A. E. R. 197, at p. 200).

On the holding that these facts constituted wilful refusal to consummate the marriage an element of doubt may well arise. What is such consummation in law? Is it complete and normal intercourse from which conception may or may not take place, or only intercourse from which conception does in fact result? And if the former is the true view, can one say that intercourse in which contraceptives are used can never consummate a marriage? This view appears to be a logical deduction from recent cases, and in particular from *Cowen v. Cowen* (*supra*). As was pointed out by Mr. Justice Denning at a recent public lecture (King's College, London, January 31, 1947), in the present state of law parties may obtain a decree of nullity by affirming (whether it be true or false) that contraceptives have always been used.

(Latey 170, 171, 174.)

4. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Covenant not to assign or underlet without landlord's consent in writing—refusal of consent to underletting on ground that proposed under-tenant enjoyed diplomatic privilege—refusal unreasonable.—In *Parker v. Boggon* (1946), 63 T. L. R. 4, a lessee had covenanted that he would not assign or underlet without the previous consent in writing of the landlord. By section 19 (1) of the Landlord and Tenant Act, 1927, such a covenant is deemed to be subject to a proviso to the effect that such consent is not to be unreasonably withheld.

On the tenant applying for consent to underlet to an official of the Turkish Embassy, the landlord refused consent because the proposed under-tenant was entitled to claim diplomatic privilege. The tenant accordingly made the underletting without consent. The landlord then sued for forfeiture.

It was held by Macnaghten, J., that it was not reasonable to object

to the underletting on the ground that the proposed undertenant was entitled to diplomatic privilege, and the claim for forfeiture accordingly failed.

It is to be noted that the general principle is that a refusal of consent must, to be reasonable, be on a ground having reference either to the personality of the proposed assignee or to the effect of the proposed assignment on the user and occupation of the premises: *Houlder Bros. & Co. v. Gibbs*, [1925] Ch. 575. However unreasonable it would be to refuse, such consent must be asked for; though if it is refused unreasonably the lessee may then go ahead and sublet without consent: see *Barrow v. Isaacs*, [1891] 1 Q. B. 417. Where a valuable lease is at stake the more prudent course is to get the declaration of the Court first.

(Woodfall, 24th ed., p. 579; K. & E., 14th ed., Vol. 1, p. 939.)

Small Tenements Recovery Act, 1838—direction by local authority that rates to be paid by the landlord—rent and rates added together exceed £20 a year—case within jurisdiction of magistrates.—In *Philips v. Long* (1946), 63 T. L. R. 127, the rent of a dwelling-house was 4s. 8d. a week and so the landlord's claim for possession of it fell within the jurisdiction of the magistrates' Court under the Small Tenements Recovery Act, 1838, the limit of jurisdiction under that Act being £20 a year. But the local authority had made a direction, under section 11 of the Rating and Valuation Act, 1925, that the rates, which amounted now to 3s. 2d. per week, should be paid by the owner and not by the occupier. Under section 11 (9) the owner had the right to be reimbursed by the occupier for any rates he had to pay under that direction.

It was held by the Divisional Court (Lord Goddard, C.J., Humphreys and Lewis, JJ.) that the amount which the landlord was entitled to be reimbursed under that provision was not rent and, therefore, the claim for possession fell within the jurisdiction of the magistrates' Court though the rent and rates when added together exceeded £20 a year.

This case invites comparison with *Somersshield v. Robin* (1946), 62 T. L. R. 196, on a somewhat similar question in relation to county court jurisdiction. The important question is, what is actually reserved as rent?

(Woodfall, 24th ed., p. 1116.)

Fixtures—storage batteries standing on table and connected by wires to fixed generating plant.—In *Jordan v. May* (1947), 63 T. L. R. 127, a lease included a shed in which was an electrical generating plant consisting of an engine and dynamo bolted to a concrete base, and storage batteries standing on a table. The batteries were connected by wires to the dynamo and to the wiring system of the premises. The function of the batteries was to store the electrical energy which had been generated by the engine through the dynamo, thus keeping the energy available for lighting the premises.

The premises were requisitioned during the tenancy and remained requisitioned at the date of the action; the plant was dismantled by the tenant on the authority of the requisitioning authority, and the batteries were now found to have suffered considerable deterioration. There was a covenant in the lease by the tenant to keep the generating plant in good condition and to replace all such parts thereof as should become worn out.

Some damage was proved to have occurred to the engine, but much more extensive damage, amounting to £110, to the batteries.

The tenant relied on the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1), which provides that no remedy for breach of any repairing covenant contained in the lease shall be enforced in respect of any damage to the land occurring during the period of the requisitioning. The important question which the County Court Judge had therefore to determine was whether any part of the generating plant, and if so what part, had been requisitioned. The requisitioning notice referred to the shed but did not specifically mention the plant or any part of it. The County Court Judge held that the engine and dynamo, being bolted to the concrete base, were fixtures and part of the land, and accordingly part of what had been requisitioned; but that the batteries were not fixtures and accordingly not part of the land requisitioned, so the statutory protection afforded by the Landlord and Tenant (Requisitioned Land) Act did not apply to them, and he awarded the landlord £110 damages. The tenant appealed. The Judge's decision as to the fixed engine was not challenged; as to which see *Crossley v. Lee*, [1908] 1 K. B. 86.

It was held by the Court of Appeal that there was evidence on which the Judge could fairly draw a distinction between the batteries and the engine which supplied current to them, and that he was entitled to draw the inference which he had drawn that the batteries were intended to continue chattels. Morton, L.J., emphasised that the whole question is in each case one of fact depending on the circumstances, so that decisions in other cases are not necessarily any guide. He did, however, quote the proposition laid down by Blackburn, J., in *Holland v. Hodgson* (1872), L. R. 7 C. P. 328, at p. 335: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel".

There was considerable discussion as to whether the batteries were merely an essential and integral part of something which was fixed, in this case the engine. It will be remembered that that was held to be the position in *Pole-Carew v. Western Counties and General Manure Co.*, [1920] 2 Ch. 97. The Court of Appeal held that that was not the position here. "As regards the law", said Asquith, L.J., "a criterion laid down in some recent cases, which seems to have been accepted by both parties to the argument, is that the test is whether the article in question is an integral or essential part of a machine which is itself admittedly a fixture. To me these batteries seem not so much an essential or integral part of the engine, or indeed a part of it at all, as a convenient accessory, a receptacle attached to the engine which supplies current, in which that current is stored (they are called 'storage batteries'), and through which the current is transmitted to the wiring system of the house. If so, the case seems, on its facts, though not exactly on all fours with any which have been cited, more nearly analogous to *Northern Press and Engineering Co. v. Shepherd* (1908), 52 S. J. 715; *Hulme v. Brigham*, [1943] K. B. 152, and *British Economical Lamp Co. v. Empire (Mile End)* (1913), 29 T. L. R. 386, than to any of the cases cited for the tenants, and I agree that the appeal should be dismissed".

Both *Northern Press and Engineering Co. v. Shepherd and Hulme v. Brigham*, were cases of printing machines which were not themselves fixed in any way but were connected by driving belts to motors which were fixed; it was held that this connection merely by the means of transmitting power did not render the printing machines fixtures. In *British Economical Lamp Co. v. Empire (Mile End)* it was held that the mere plugging-in of electric bulbs into fixed sockets did not make the bulbs fixtures. The principle behind these cases seems to be that an indirect attachment to the realty by the means of supplying the motive power does not change the chattel into a fixture. It is submitted that this principle must be correct, otherwise every domestic appliance run by electricity supplied through a cable plugged into a socket would be a fixture. That surely cannot be so. There are other decisions, which were cited to the Court in *Jordan v. May*, where the attachment of an appliance to the realty by the pipe feeding it with the water it required to be supplied with in use was held not to constitute that appliance a fixture. (Woodfall, 24th ed., pp. 751-754.)

Notice to quit given by purchaser to whom deed of conveyance has been delivered as an escrow—notice to quit given during currency of longer notice.—The interesting case of *Thompson v. McCullough* (1947), 63 T. L. R. 95, involves a number of points.

The tenant of a house sublet it furnished on a weekly tenancy while he was in the army. After his return, he gave the subtenant notice on April 5, 1946, to quit on May 4, 1946. He then learnt that the subtenant was negotiating for purchase of the freehold and gave a second notice, dated April 10, to determine the furnished subtenancy on April 20. On April 10 the subtenant received a deed of conveyance executed by the freeholder, although he had then paid a small part only of the purchase money. On April 12 the subtenant, purporting to act now as landlord, gave the tenant notice to terminate his tenancy on April 20. The subtenant did not pay the balance of the purchase price till June 21, 1946.

It was held by the Court of Appeal—

(1) That the Judge was entitled to draw the inference which he did that as part only of the purchase money had been paid when the executed conveyance was delivered, it was delivered as an escrow, to become effective when the balance was paid.

(2) That the notice given by the subtenant to the tenant on April 12 was invalid because the subtenant was not then the freeholder: he did not become the freeholder until the escrow became effective as a deed.

(3) That when the escrow became effective as a deed on June 21 it did not then operate retrospectively to validate the notice given on April 10.

(4) That the tenant's notice given on April 10, being sufficient for the determination of a weekly tenancy, was effective notwithstanding that an earlier notice was still current.

The claim which succeeded was therefore the tenant's claim for possession against the subtenant who had now bought the freehold, and the latter's claim failed.

(Woodfall, 24th ed., pp. 963, 981; Norton on Deeds, 2nd ed., p. 18.)

THE LIBRARY.

A Manual of the Law of Real Property. By R. E. MEGARRY. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1946. xxxii and 590 pp. (Price 25s. net.)

The general nature of this book is indicated in the preface—it is “primarily intended for the examination candidate whose main anxiety is not whether he will head the list but whether he will appear in it at all”. It is safe to say that not only such students but also their more confident fellows (if any) and teachers of Real Property will welcome warmly an exposition which is both comprehensive and suitable for beginners. The author includes sufficient history to provide a background for the modern rules and does not hesitate to discuss fully difficult topics—one may instance future interests and priority of mortgages—where over-simplification would probably have resulted in incomplete understanding. Explanations are clear, with a practical flavour that will be appreciated.

The basic principles are dealt with in Chapters 2-7, entitled respectively Tenures, Estates, Law and Equity, Future Interests, Settled Land and Trust for Sale, and Co-Ownership. The details of the fee simple, entailed interests and life interests appear in Chapter 3; section 1 of the Law of Property Act, 1925, and an outline of the 1925 legislation in Chapter 4; the fiduciary character of estate ownership of settled land after 1925 is discussed in Chapter 6. Opinions may be divided as to whether this arrangement—designed to avoid repetition and preliminary explanation and based on the justifiable premise that a beginner must read at least twice or thrice to attain complete understanding (see p. 1)—is as happy as the treatment of individual topics. It is felt that a student may form first impressions which will not be consonant with the modern classification and relationship of legal estates and equitable interests; it is submitted that this is of such fundamental importance as to require early explanation in outline, even at the cost of repetition. It is suggested, too, that in Chapter 3 the practicability of concurrent legal estates and interests in land merits fuller treatment; in this connection the use in Chapter 11 (Leases and Tenancies) of the word “reversion” to describe the lessor’s estate may be confusing without further definition, especially as the word has already been used in another sense in Chapter 4 (Future Interests).

References to cases—but not, happily, to the 1925 Acts—have been deliberately kept to a minimum. Students will like the glossary of technical terms and, in the text, the parenthetical explanations of pronunciation—though these might be better placed in the glossary. The publishers are to be congratulated on the print and lay-out.

Altogether, Mr. Megarry’s book is a notable addition to existing textbooks and a more detailed work foreshadowed in the preface will be eagerly awaited.

F. R. CRANE.

Green’s Death Duties. Second edition. By G. M. GREEN, LL.B. Butterworth. 1946. (£2 12s. 6d.)

It is not surprising that a second edition of *Green on Death Duties* has been called for, and now that it has appeared it will be a most welcome addition to the select company of up-to-date textbooks on the forbidding but important subject with which it deals. The author holds a high position in the Estate Duty Office, and, though his work has no official flavour, it is the fruit, not only of close study of the law, but of continuous and prolonged experience of its practical application. The new edition covers the entire field of Death Duty legislation up to and including the Finance Act, 1946, the relevant provisions of which are printed and discussed, together with those of the recent Double Taxation Agreements with the United States and Canada. A particularly valuable feature of the work is the attention given to the incidence and adjustment of duties and to “free of duty” provisions. As the author rightly points out, the question who bears a particular duty may be as important to the individuals concerned as the question whether it is chargeable. There is a valuable exposition of the “benefits from companies” provisions of the Finance Act, 1940, and the amending legislation, and many of their mysteries are

elucidated—it would be an exaggeration to say all, for even Mr. Green (like the rest of us) seems to find some of them impenetrable. The new edition is attractively produced and printed, and the one criticism that some readers may make is that it does not always stay open without resistance at a given page—a small, but not unimportant, defect in a textbook which the practitioner, sure of its reliability, will so often wish to consult.

L. J. S.

Modern Equity. Fourth edition. By H. G. HANBURY. Royal 8vo. xii and 740 pp. (£1 17s. 6d. net.)

The new edition of Dr. Hanbury's *Equity* presents the reader with many changes, both of substance and format. The introduction of a system of sub-headings and a rearrangement of a considerable portion of the text are primarily designed to render this comprehensive work more palatable to the student, while the reconsideration of various theoretical and practical topics will prove of more immediate interest to those familiar with earlier editions. Most notable among these is a considerable hardening of opinion against the somewhat artificial distinction drawn in relation to secret trusts between cases where the legatee takes beneficially and where he is designated as trustee on the face of the will, but the author's attempt to avoid the cogent language of the Court of Appeal in *Re Keen* cannot be considered convincing. The trust concept in its relation to "third party contracts" has been subjected to a fundamentally new approach, and the cases grouped around *Morice v. Bishop of Durham* elevated to a separate chapter on "Trusts of Imperfect Obligation". The section dealing with *Howe v. Earl of Dartmouth* has been completely rewritten, on the basis of the recent article by Mr. Bailey in 7 *Conveyancer* 129. It is regretted that insufficient space is given to the rules of practice embodied in *Re Fawcett* and *Re Parry*. Apart from interesting observations on the perplexing difficulties raised by the problem of the application of assets in relation to Part II of the First Schedule, Administration of Estates Act, 1925, the most controversial change consists in a new analysis of the doctrine of Election. This gravitates in a double-fronted attack on *Wollaston v. King*, which is the more surprising as it postulates the correctness of the much disputed decision in *Re Macartney* to which reference had been altogether omitted in previous editions of this work.

Certain portions of Dr. Hanbury's *Equity* which impinge on isolated problems of conveyancing (*e.g.*, trust for sale) will still appear the least satisfactory feature to the practitioner, and it is feared that a tendency towards over-simplification may well lead to pitfalls which more detailed elaboration could have avoided.

This text-book, which has already gained a high rank in legal literature, will continue to be of absorbing interest to all interested in the theoretical foundations of equity.

J. G. F.

Inventions, Patents and Monopoly. By PETER MEINHARDT, with a foreword by James Mould. London: Stevens & Sons, Ltd. 1946. 337 pp. (Price 25s.)

This is a book about patent law, and for anyone interested in the subject of the proper protection of "inventors'" rights it is a very interesting book. It is essentially not a usual text-book of law. It combines a statement of law and practice and criticism. It is not above citing the *Readers' Digest* for October, 1942, Dickens's *Poor Man's Tale of a Patent*, the *Evening Standard* and the *Daily Express*. Indeed, it contains reference to a great deal that lawyers normally regard as outside their province. But for those interested in patents and monopolies in particular, or in the economics of law and judicial administration, this is a book to be read.